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No. 09-206

Supreme Court, U.S.
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In The

Supreme Court of the United States

ANETTE FORSMAN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATES OF ROBIN FORSMAN AND CHRISTER FORSMAN, ET AL.,

Petitioners,

v.

CESSNA AIRCRAFT COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

On a foggy morning in Milan, Italy, a Cessna sales demonstration flight disobeyed its taxi instructions, became lost in the fog, and taxied onto an active runway in front of a departing SAS airliner, killing 118 people and injuring four others. One of the decedents was a U.S. citizen. Her seven survivors, all U.S. citizens, filed a wrongful death action against Cessna, a U.S. corporation, in a U.S. district court. The survivors of 68 other decedents (and one personal injury victim) -- citizens of seven different European nations -- filed suit in the same court. Cessna moved to dismiss all 70 cases for *forum non conveniens*. Mindful of the heightened deference given to a U.S. citizen's choice of a U.S. forum in a suit against a U.S. corporation, the district court denied Cessna's motion to dismiss the action of the U.S. citizens. However, and notwithstanding that 39 citizens of Italy and Denmark were the beneficiaries of bilateral international treaties promising their citizens "no less favorable" treatment than a U.S. citizen would receive when bringing suit in a U.S. court, the district court dismissed the cases of all 69 European plaintiffs. The court of appeals affirmed. It concluded, in direct conflict with a consistent line of decisions from the Second Circuit, that the "no less favorable" language in the treaties did not entitle the foreign plaintiffs to the favorable deference to which the U.S. citizens were entitled -- and that "the lesser deference given by the district court to the European Plaintiffs' choice of forum was consistent with the treaty obligations of the United States." App. A, 14a-15a. The question presented is therefore this:

Where a bilateral international treaty guarantees a foreign national "*no less favorable*" access to U.S. courts to redress injuries caused by a U.S. actor than a U.S. citizen would enjoy, was it permissible for the court of appeals to conclude that the foreign plaintiffs' choice of forum in this case was entitled to *less favorable* treatment than that afforded to the U.S. citizens' choice of forum?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court below whose judgment is the subject of this petition is as follows:

Plaintiffs-Appellants and Petitioners: Anette Forsman, individually and as pers. rep. of the estates of Robin Forsman and Christer Forsman; Catharina Lindgren, individually and as pers. rep. of the estate of Tobias Lindgren; Ruth Lund, Bjarne Lund, Torben Lund, individually and as co-pers. reps. of estate of Vibeke Vindahl Lund; Birgitte Andersen and Sven Andersen, individually and as co-pers. reps. of the estate of Hans Peter Andersen; Mathias Vindahl Lund Andersen; Caroline Vindahl Lund Andersen; Cecilie Vindahl Lund Andersen; Heidi J. Nielsen, individually and as pers. rep. of the estate of Jens Nielsen; Hugo Edward Nielsen; Dante Jens Nielsen; Sofie Holstein-Krag, individually and as pers. rep. of the estate of Anders Hyllander; Jenny Holstein-Krag; Fanny Holstein-Krag; Heli Karjaluoto, individually and as pers. rep. of the estates of Jan Karjaluoto and Alexander Karjaluoto; Josefine Karjaluoto; Marie Stjernlof, individually and as pers. rep. of the estate of Hakan Andersson; Caroline Stjernlof; Ingemar Essebro and Barbro Essebro, individually and as co-personal reps. of the estate of Robert Essebro; Harri Vaara, individually and as pers. rep. of the estate of Arja Jasperi; Aune Mecklin, individually and as pers. rep. of the estate of Anu Mecklin; Ari Makela, individually and as pers. rep. of the estate of Anitta Mattsson; Jonathan M. Kruger, individually and as pers. rep. of the estate of Michael L. Kruger; Eva-Britta Naslund, individually and as pers. rep. of the estate of Eric Edward Kruger; Dumitru Gaucan, individually and as

pers. rep. of the estate of Gabriela Gaucan; Kent Eriksson, individually and as pers. rep. of the estate of Gunilla Eriksson; Lena Blidborg, individually and as pers. rep. of the estate of Par Eriksson; Kurt Stromme and Liv Sisdel Stromme, individually and as co-pers. reps of the estate of Jan Marc Stromme; Roy Johansen and Liv Bentzen, individually and as co-pers. reps. of the estate of Heidi Falch; Jan Andersson, individually and as co-pers. rep. of the estate of Gunilla Fristedt; Leif Schytt Larsen and Vivi Schytt Larsen, individually and as co-pers. reps. of the estate of Steen Schytt Larsen; Larissa Pukkonen, individually and as pers. rep. of the estates of Bert-Arne Karlsson and Daniel Karlsson; Camilla Karlsson; Maritta Paakkinen, individually and as pers. rep. of the estate of Tarmo Honkaranta; Tor Ivar Heggelund and Nanne Heggelund, individually and as co-pers. reps. of the estate of Espen Heggelund; Bernt Kristensen and Kirsten Lis Olesen, individually and as co-pers. reps. of the estate of Pia Kristensen; Bertil Johansson, individually and as pers. rep. of the estate of Ola Pettersson; Torbjorn Soderberg, individually and as pers. rep. of the estate of Olaf Jakobsson; Nina Hartman Gustafsson, individually and as pers. rep. of the estate of Joakim Gustafsson; Emil Gustafsson, Rasmus Gustafsson, Anna Gustafsson and Alberte Gustafsson; Mette Felthaus and Mai Britt Myllerup Laursen, individually and as co-pers. reps. of the estate of Inger Marie Felthaus; Henryk Grynfeld and Klara Sigvardsson, individually and as co-pers. reps. of the estate of Helena Grynfeld; Charlotte Von Hueck, individually and as pers. rep. of the estate of Janne Penttinen; Claudia Bergna, individually and as pers. rep. of the estate of Renato Cairo; Christiano Cario; Rasmus Lindin and Helena Lindin, individually and as co-pers. reps. of the estate of Kurt Ake Larsson; Bodil

Britha Iversen, individually and as pers. rep. of the estate of Ulla Helga Iversen; Bodil Britha Iversen and Katarine Kristensen, individually and as co-pers. reps. of the estates of Thyge Lund Iversen and Asger Lund Iversen; Jimmy Bruun Felthaus and Mette Felthaus, individually and as co-pers. reps. of the estate of Arly Felthaus; Vagn Mogensen and Keth Ulla Mogensen, individually and as co-pers. reps. of the estate of Lars Mogensen; Cyril Olsen and Birgit Schlichter Olsen, individually and as co-pers. reps. of the estate of Anja Schlichter Olsen; Katarine Kristensen, individually and as pers. rep. of the estate of Poul Lund Kristensen; Donatella Perrone, individually and as pers. rep. of the estate of Marco Cantu; Alessia Cantu; Adam Ludvig Friboe Garde and Marie Luise Garde, individually and as co-pers. reps. of the estate of Mette Friboe Garde; Bjarni Danielsen and Sofia Danielsen, individually and as co-pers. reps. of the estate of Eiler S. Danielsen; Luigi Fogliani and Piera Corno, individually and as co-pers. reps. of the estate of Laura Fogliani; Ib Fleming Olesen and Lise Olesen, individually and as co-pers. reps. of the estate of Marianne Olesen; Anne Helen Jeppesen, individually and as pers. rep. of the estate of Mads Lassen; Lorena Venturo Frigerio, individually and as pers. rep. of the estate of Franco Frigerio; Valentina Frigerio; Giorgio Frigerio; Pasquale Padovano, individually and Teresa Bruni, individually, and as parents and natural guardians of Anna Padovano; Silvia Pastore, individually and as pers. rep. of the estate of Lorenzo Pettinaroli; Beatrice Pettinaroli; Maria Rosa Colleoni, individually and as pers. rep. of the estate of Osvaldo Renato Rosello; Francesca Rosello; Elisabetta Previati, individually and as pers. rep. of the estate of Peppino Salati; Caterina Salati; Chiara Salati; Ole Ricard Andersen and Birgitte C. Christiansen, individually and as co-

pers. reps. of the estate of Lise Lotte Andersen; Vittorio Agosti and Mirta Faverzani, individually and as co-pers. reps. of the estate of Simone Agosti; Chiara Giussani, individually and as pers. rep. of the estate of Michele Fontana; Martino Fontana; Leonardo Fontana; Roberto Vanelli and Giuliana Tosi, individually and as co-pers. reps. of the estate of Viviana Vanelli; Lodovico Gioacchini and Carla Azimonti, individually and as co-pers. reps. of the estate of Riccardo Gioacchini; Knud Erik Lassen and Annie Celia Lassen, individually and as co-pers. reps. of the estate of Finn Lassen; Giuseppe Conte and Franca Furlotti, individually and as co-pers. reps. of the estate of Andrea Conte; Adele Scarani Pesapane, individually and as pers. rep. of the estate of Maurizio Pesapane; Filippo Pesapane; Lucia Pesapane; Serena Pesapane; Silvana Massa, individually and as pers. rep. of the estate of Giancarlo Savio; Mariangela Savio; Erica Savio; Egidio Poli, individually and as pers. rep. of the estate of Riccardo Poli; Angelo Prandi and Fernanda Saccaggi, individually and as co-pers. reps. of the estate of Massimo Prandi; Sara Avigo Predaroli, individually and as pers. rep. of the estate of Filippo Predaroli; Claudio Giumelli and Serena Pruno, individually and as co-pers. reps. of the estate of Valentina Giumelli; Giacomo Moscatello, individually and as pers. rep. of the estate of Francesco Moscatello; Stefano Bo., individually and as pers. rep. of the estate of Natalie Kaye Micallef.

Plaintiffs-Cross-Appellees: Jack King,individually and as pers. rep. of the estate of Jessica King, was not adversely affected below and is not a petitioner here.

Defendant-Appellee-Cross-Appellant and Respondent: Cessna Aircraft Company, a Kansas Corporation.

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PETITION FOR WRIT OF CERTIORARI

The petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A, 1a-17a, and is reported at 562 F.3d 1374.

The opinion of the United States District Court for the Southern District of Florida appears at Appendix B, 18a-21a, and is unofficially reported at 2008 WL 276015.

The prior opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix C, 22a-46a, and is reported at 505 F.3d 1160.

The prior opinion of the United States District Court for the Southern District of Florida appears at Appendix D, 47a-60a, and is reported at 405 F. Supp. 2d 1374.

The initial opinion of the United States District Court for the Southern District of Florida appears at Appendix E, 61a-75a, and is unpublished.

JURISDICTION

The Court of Appeals judgment was entered on March 27, 2009. A timely petition for rehearing and rehearing en banc was denied by an order filed May 22, 2009, which appears at Appendix F, 76a-77a. The

jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution provides in relevant part: "[A]ll Treaties made, or which shall be made, under the Authority of the United States shall be the Supreme Law of the Land." U.S. CONST. art. VI, cl.2.

Article V.4 of the *Treaty of Friendship, Commerce, and Navigation between the United States and Italy of July 26, 1949*, provides:

> The nationals . . . of either High Contracting Party shall enjoy freedom of access to the courts of justice . . . in the territories of the other High Contracting Party, in all degrees of jurisdiction established by law, both in pursuit and in defense of their rights; shall be at liberty to choose and employ lawyers and representatives in the prosecution and defense of their rights before such courts . . . ; and shall be permitted to exercise all these rights and privileges, in conformity with the applicable laws and regulations, upon terms *no less favorable* than the terms which are or may hereafter be accorded to the nationals . . . of the other High Contracting Party and *no less favorable* than are or may hereafter be accorded to the nationals . . . of any third country. . . .

63 Stat. 2255, T.I.A.S. No. 1965, 1949 WL 37628 (emphasis supplied).

Articles V.1 and XXII.1 of the *Treaty of Friendship, Commerce and Navigation between the United States and the Kingdom of Denmark, July 30, 1961*, provide:

> Nationals . . . of either Party shall be accorded national treatment and most-favored nation treatment with respect to access to courts of justice . . . within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. . . .
>
> . . . .
>
> The term "national treatment" means treatment accorded within the territories of a Party upon terms *no less favorable* than the treatment accorded therein, in like situations, to nationals . . . of such Party.

12 U.S.T. 908, T.I.A.S. No. 4797, 1961 WL 62672 (emphasis supplied).

STATEMENT OF THE CASE

On a foggy morning in Milan, Italy, nearly eight years ago, a Cessna sales demonstration flight disobeyed its taxi instructions, became lost in the fog, and taxied onto an active runway in front of a departing SAS airliner, killing 118 people and injuring four others on the ground. One of the decedents was a U.S. citizen, domiciled in California. In March, 2003, her seven survivors, all U.S. citizens, filed a wrongful death action against Cessna, a U.S. corporation, in the United States District Court for the Southern District of Florida. The survivors of 68 other decedents (and one personal injury victim) -- citizens of seven different

European nations -- filed suit in the same court.[1] Cessna moved to dismiss all 70 cases for *forum non conveniens*.

On October 29, 2004, quoting from binding precedent in the Eleventh Circuit, the district court observed that the defendant must present "'positive evidence of unusually extreme circumstances' and 'thoroughly convince [this Court] that material injustice is manifest before ousting a domestic plaintiff from this Country's courts'."; it concluded that "the Defendant has failed to show that a material injustice would be manifest if the case were tried in the United States"; and it denied the motion to dismiss. App. E, 61a-63a. In the process, it rejected the contention of the 39 plaintiffs from Italy and Denmark that they were entitled to the same level of deference given to the U.S. claimants because of the "no less favorable" treatment treaties quoted in relevant part at pages 2-3, *supra*. App. E, 65a-67a. Although it acknowledged the existence of a long line of Second Circuit decisions supporting the plaintiffs' contention, it declined to follow them.

It criticized the decisions for not "directly analyz[ing] why a treaty should affect the level of deference to be applied during the *forum non conveniens* doctrine analysis." App. E, 65a. It characterized the square holdings in the decisions as mere dicta, which it was "not bound to follow." App. E, 66a. It characterized the decisions as "unworkable,"

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[1] The European plaintiffs represent 21 Swedish citizens, 20 Italian citizens, 19 Danish citizens, 4 Finnish citizens, 3 Norwegian citizens, 1 Romanian citizen, and one British citizen.

because "courts would be routinely forced to interpret the language of many different treaties." App. E, 66a. It observed that "the court's inherent power to protect the integrity of its process through *forum non conveniens* was analogous to its "inherent power to punish contempt" -- and that "[a]llowing a treaty, including its legislative history, to have such an arbitrary impact on the courts' inherent powers is another reason not to adopt counsel's position." App. E, 66a-67a. And finally, it chose to align itself with three district court decisions that had declined to afford foreign plaintiffs the same deference as a U.S. citizen would receive, without recognizing that the treaties relied upon in those cases provided only "access to courts," rather than "no less favorable" treatment than a U.S. citizen would receive. App. E, 67a.[2]

Although Cessna had originally conceded that "the Italian 'legal issues [were] fairly simple,'" it changed its position dramatically after its motion to dismiss was denied. During a two-day hearing to determine Italian law shortly before the scheduled trial date, Cessna's expert now disagreed with the plaintiffs' expert on nine different issues of Italian law. App. D, 56a. Because "[i]ssues of Italian law which were deemed simple in the past, have now become complicated" and because of "the apparent direct conflict in the experts' testimony," the district court *sua sponte* asked the parties "to rebrief the

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[2] The representatives of the four Finns, the three Norwegians, and the Romanian who died in the accident are protected by "freedom of access" and "access" treaties. App. A, 13a, n2. The plaintiffs did not contend in the court of appeals that these treaties entitled these citizens to "no less favorable" treatment than U.S. citizens would enjoy.

Reconsideration of the Motion to Dismiss based on *forum non conveniens*." App. D, 48a-49a, 58a. And on October 21, 2005, more than a year after initially denying Cessna's motion to dismiss, and after invoking Emerson's "a foolish consistency is the hobgoblin of small minds," it dismissed the cases of the 69 European plaintiffs. App. D, 58a. It did not dismiss the case of the U.S. citizens, however; rather, it stayed their case "pending resolution of this case in the Italian courts." App. D, 58a.

All 70 plaintiffs appealed to the United States Court of Appeals for the Eleventh Circuit. Two years later, on October 24, 2007, the court of appeals concluded that the district court had abused its discretion in staying the U.S. citizens' case for an indefinite and protracted period of time, and it vacated the stay order. App. C, 44a. It declined to review the dismissal of the European plaintiffs' cases, however, and simply remanded to the district court "to decide in the first instance how to proceed from here." App. C, 46a. On remand, the district court again dismissed the European plaintiffs' cases, but allowed the U.S. citizens' case "to proceed before this Court." App. B, 21a. The European plaintiffs' appealed the dismissal order; Cessna cross-appealed the denial of its motion to dismiss the U.S. citizens' case. App. A, 4a.

On March 27, 2009, the court of appeals concluded that it lacked jurisdiction to entertain Cessna's cross-appeal, and the cross-appeal was dismissed. App. A, 4a-9a. It affirmed the dismissal of all the European plaintiffs' cases. App. A, 17a. It acknowledged one of the several Second Circuit decisions holding that "a foreigner's right to sue in the United States is not of a lesser magnitude than an American's right when a

treaty exists between the two countries giving a foreigner 'no less favorable' access to the other country's courts." App. A, 13a. But it purported to find a different rule in a subsequent Second Circuit decision, and it held (without endorsing a single one of the reasons given by the district court) that "the lesser deference given by the district court to the European plaintiffs' choice of forum was consistent with the treaty obligations of the United States." App. A, 14a-15a. The European plaintiffs' timely petitions for rehearing and rehearing en banc were denied on May 22, 2009.

Nearly eight years have elapsed since the European plaintiffs lost their loved ones as a result of Cessna's negligence. In the argument that follows, we intend to demonstrate that the court of appeals misread and misapplied the subsequent Second Circuit decision upon which it relied; that its decision is in direct conflict with a long and consistent line of Second Circuit decisions to the contrary; and that the conflict is in need of and worthy of resolution by this Court.

REASONS FOR GRANTING THE PETITION

In the Eleventh Circuit -- and in other courts of appeals -- a defendant must shoulder an extremely heavy burden to oust a U.S. plaintiff from a U.S. court:

> While the Supreme Court has been clear that "dismissal should not be *automatically barred* when a [domestic] plaintiff has filed suit in his home forum," *Piper Aircraft Co.*, 454 U.S. at 255 n. 23, 102 S. Ct. 252 (emphasis added), in this Circuit we have long mandated that district courts "'require positive evidence of unusually

> extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion as may exist to deny a United States citizen access to the courts of this country.'" *La Seguridad*, 707 F.2d at 1308 n. 7 (*quoting Burt v. Isthmus Dev. Co.*, 218 F.2d 353, 357 (5th Cir. 1955)); *see also Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339, 342 (8th Cir. 1983) (requiring same standard); *Founding Church of Scientology v. Verlag*, 536 F.2d 429, 435 (D.C. Circuit 1976) (same).

SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A., 382 F.3d 1097, 1101-02 (11th Cir. 2004) (footnotes omitted).

Mindful of the heightened deference required by this mandate, the district court permitted the U.S. citizens to proceed with their case against Cessna in the U.S. But notwithstanding that the representatives of at least 39 of the 69 foreign nationals who died or were injured in the same aviation accident were entitled to "no less favorable" treatment by treaties with their nations, the district court afforded them far less deference and dismissed their cases. Because the U.S. citizens' case was permitted to proceed and all the European plaintiffs were tossed out of court, it is undeniable that the European plaintiffs received *far less favorable* treatment than the U.S. citizens -- in direct contravention of the plain language of these international treaties, effectively rendering the treaties of their various nations meaningless.

This result could *not* have been reached in the Second Circuit:

> We feel constrained to comment . . . on statements in the judge's opinion to the effect that a foreign plaintiff's "right to sue in the United States is clearly of a less magnitude than that of an American citizen." . . . Whatever the merits of that proposition generally, which does find some support in cases suggesting that our courts should be quite cautious in dismissing on forum nonconveniens grounds when suit is brought by an American citizen . . . , we think it has no application where, as here, a treaty between the United States and the foreign plaintiff's country allows nationals of both countries access to each country's courts on terms *no less favorable* than those applicable to nationals of the court's country. . . .

Farmanfarmaian v. Gulf Oil Corp., 588 F.2d 880, 882 (2nd Cir. 1978) (emphasis supplied).

Farmanfarmaian remains the law in the Second Circuit:

> We have ruled . . . that when a treaty with a foreign nation accords its nationals access to our courts equivalent to that provided American citizens, identical forum non conveniens standards must be applied to such nationals by American Courts. [Citations omitted]. Because such a treaty exists between the United States and Venezuela . . . , no discount may be imposed upon the plaintiff's initial choice of a New York forum in this case solely because [the plaintiff] is a foreign corporation.

Blanco v. Banco Industrial De Venezuela, 997 F.2d 974, 981 (2d Cir. 1993).

Similarly:

> Because of the existence of the two international compacts, the district court should have applied the same *forum non conveniens* standards that it would have applied to a United States' citizen [citations omitted]. It specifically failed to do so, and this failure tainted its entire holding.

Irish National Ins. Co., Ltd. v. Aer Lingus Teoranta, 739 F.2d 90, 91-92 (2d Cir. 1984).

Finally, in *Alcoa S.S. Co., Inc. v. M/V Nordic Regent*, 654 F.2d 147, 152-53 (2d Cir. 1980) (*en banc*), the Second Circuit, sitting *en banc*, acknowledged and reaffirmed its decision in *Farmanfarmaian*; stressed that "no less favorable" treaty obligations are "paramount under the Constitution"; stated that they require "a uniform standard for determining forum non conveniens;" and stated that, to read them otherwise would "do violence to our treaty obligations." Because this was an *en banc* decision, no subsequent panel could possibly have reached a different conclusion.

Nevertheless, the court of appeals in the instant case purported to find that different conclusion in a more recent Second Circuit decision, *Pollux Holding Ltd. v. The Chase Manhattan Bank*, 329 F.3d 64 (2d Cir. 2003). We respectfully submit that the decision was misread and misapplied. At issue in *Pollux*

Holding was a treaty between the U.S. and Liberia which merely promised "freedom of access" to the courts of the respective countries -- *not* "no less favorable" treatment -- and the Second Circuit was careful to distinguish between the two types of treaties:

> With respect to the United States treaty with Liberia, the treaty merely grants the citizens of each country "freedom of access" to the courts of the other country. [Citation omitted]. The treaty stops well short of granting the nationals of both countries "access to each country's courts on terms no less favorable than those applicable to nationals of the court's country." *See Farmanfarmaian v. Gulf Oil Corp.*, 588 F.2d 880, 882 (2d Cir. 1978). As we have noted before, "[h]istory and practice . . . teach that a principle of equal access must be explicitly adopted." *Murray v. British Broad. Corp.*, 81 F.3d 287, 291 (2d Cir. 1996).
>
> Further, in prior *forum non conveniens* cases where we have required that a foreign plaintiff be treated on terms no less favorable than those applicable to U.S. nationals, the foreign plaintiff was a beneficiary of a treaty with an explicit provision providing national access or treatment. *See Blanco v. Banco Indus. De Venezuela, S.A.*, 997 F.2d 974, 981 (2d Cir. 1993) (acknowledging a treaty with Venezuela that "accords its nationals access to our courts equivalent to that provided American citizens") [citation omitted]; *Irish Nat'l Ins. Co., Ltd. v. Air Lingus Teoranta*, 739 F.2d 90, 91-92 (2d Cir. 1984) ("Under the terms of a separate treaty

> between the United States and Ireland, appellant was entitled to 'national treatment with respect to . . . having access to the courts of justice'") [citation omitted]; *Farmanfarmaian*, 588 F.2d at 882 [citation omitted].
>
> Because "freedom of access" cannot be taken to mean "national access," the Liberian treaty does not afford the plaintiffs' choice of a United States forum the same deference as that afforded the choice of a U.S. citizen. Instead, Pollux and Springwell's choice of forum only merits the lesser degree of deference typically afforded foreign plaintiffs. . . .

329 F.3d at 72-73. Without more, there is simply no way in which the court of appeals in the instant case could legitimately have concluded that, in the face of the plain language of a "no less favorable" treatment treaty, *Pollux Holding* permits a court to afford "less favorable" treatment to a foreign national's choice of forum than a U.S. citizen would enjoy.

Nevertheless, the court of appeals purported to find a justification for the "less favorable" treatment it authorized in the instant case in selective bits and pieces of a dictum in *Pollux Holding* that followed the passage quoted above, which we will quote with some added emphasis so there can be no question that it did not purport to overrule *Farmanfarmaian*, its progeny, or the *en banc* decision that later ratified it:

> Even assuming that, by treaty, [the Liberian] plaintiffs were entitled to *access* to American courts on the same terms as American citizens . . . , our case law does not support plaintiffs'

> assertion that *such a treaty* would require that their choice of forum be afforded the same deference afforded to a U.S. citizen bringing suit in his or her home forum. Such a proposition impermissibly conflates citizenship and convenience . . . .
>
> A court considering a motion for dismissal on the grounds of *forum non conveniens* does not assign "talismanic significance to the citizenship or residence of the parties," . . . and there is no inflexible rule that protects U.S. citizen or resident plaintiffs from having their causes dismissed for *forum non conveniens*. . . .
>
> [A]ppellants cannot successfully lay claim to the deference owed an American citizen or resident suing in her home forum. Plaintiffs are only entitled, at best, to the lesser deference afforded a U.S. citizen living abroad who sues in a U.S. forum.

App. A, 14a (emphasis supplied).

The court of appeals in the instant case went on to state, "This analysis makes clear that although citizenship often acts as a proxy for convenience in the *forum non conveniens* analysis, the appropriate inquiry is indeed convenience." App. A, 14a. As the words emphasized above demonstrate, the "analysis" in this dictum was addressed to treaties providing mere "*access*" -- *not* to "no less favorable" treatment treaties. And the most that the dictum says is this: because even an action filed in a U.S. court by a U.S. citizen can be dismissed for *forum non conveniens* in appropriate circumstances, an "access" treaty provides

no greater insulation from dismissal of a foreign plaintiff in the appropriate circumstances.

Most respectfully, *Pollux Holding* does not even arguably purport to overrule *Farmanfarmaian*, its progeny, or the *en banc* decision that later ratified it. It does *not* hold that "the appropriate inquiry is indeed convenience" when a "no less favorable" treatment treaty establishes the appropriate level of deference to be afforded a foreign national's choice of forum. And it most certainly *cannot* justify the result reached in the instant case -- where, in the face of two treaties squarely guaranteeing 39 plaintiffs "no less favorable" treatment than the U.S. citizens would enjoy, the U.S. citizens' choice of forum was given heightened deference and they were permitted to proceed, and the European plaintiffs' choice of forum was given so little deference that they were tossed out of court.

Interpretation of Friendship, Commerce and Navigation Treaties like these "must, of course, begin with the language of the Treaty itself. The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 (1982). Most respectfully, the words "no less favorable" simply cannot mean "less favorable."

And when, as here, the language of a treaty is plain and unambiguous, it must be enforced as written -- because it is, according to Art. VI, cl. 2, of the Constitution, "the Supreme Law of the Land":

> [W]here the text is clear, as it is here, we have no power to insert an amendment. As Justice Story wrote for the Court more than a century and a half ago:
>
> > "[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops -- whatever may be the imperfections or difficulties which it leaves behind." *The Amiable Isabella*, 6 Wheat. 1, 71, 5 L. Ed. 191 (1821).

Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134-35 (1989).

We respectfully submit that the Second Circuit's decisions enforcing the "clear import" of the plain language of these "no less favorable" treatment treaties are correct. The court of appeals' attempt to distinguish those decisions was based on a failure to recognize the difference between "no less favorable" treatment treaties and "freedom of access" treaties -- and upon a misreading of *Pollux Holding*. The conflict that now exists between the Eleventh Circuit and the Second Circuit is undeniable. And no good reason

suggests itself why the conflict should be allowed to percolate among the lower courts, because there is no ambiguity in the words "no less favorable" that deserves to be explored by multiple judges to illuminate their plain meaning.

In addition, district courts confronting the question in the future will find no clear guidance in the decisional law and the conflict will likely widen if not resolved by this Court. Prior to the Eleventh Circuit's decision, several district courts in other Circuits followed the Second Circuit's decisions. *See, e. g., Grimandi v. Beech Aircraft Corp.*, 512 F. Supp. 764, 777-78 (D. Kan. 1981); *Jennings v. Boeing Co.*, 660 F. Supp. 796, 800 (E.D. Pa. 1987), *aff'd*, 838 F.2d 1206 (3rd Cir. 1988) (table); *Oxley v. Wyeth Laboratories, Inc.*, No. 91-1285, 1992 WL 116308 (E.D. Pa. 1992); *In Re Bridge-stone/Firestone, Inc., Tires Products Liability Litigation*, 190 F. Supp. 2d 1125, 1136-37 (S.D. Ind. 2002). In denying mandamus review of the district court's decision in *Bridgestone/Firestone*, the Seventh Circuit observed that, "[i]n the absence of contrary authority from this court (and there is none)," the district court's election to follow the Second Circuit's decisions on the point "was a reasoned and responsible analysis." *In Re Ford Motor Co.*, 344 F.3d 648, 653 (7th Cir. 2002). It is now clear what the law is in the Second and Eleventh Circuits, but it is unsettled everywhere else, and the remainder of the district courts of this nation deserve better guidance on the question than the conflicting appellate decisions from which they must choose at present. The petitioners therefore respectfully urge the Court to resolve the conflict.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-11033
D.C. Docket No. 03-20482-CV-FAM

[Filed March 27, 2009]

JACK KING, as personal representative of the Estate of Jessica King, deceased,
Plaintiff
Cross-Appellee,

BARBARA BREGA,
ANETTE FORSMAN, individually and/or as personal representative and/or as the Person legally authorized under applicable law to bring this wrongful death case for herself, all potential beneficiaries and/or The Estate of Robin Forsman, deceased, *et al.*,
Plaintiffs-Appellants,

versus

CESSNA AIRCRAFT CO.,
a Kansas corporation,
Defendant-Appellee
Cross-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

(March 27, 2009)
Before DUBINA, BLACK and FAY, Circuit Judges.

PER CURIAM:

Sixty-nine European plaintiffs appeal the district court's order dismissing their case against Cessna Aircraft Company on the basis of *forum non conveniens*. We find no abuse of discretion and therefore affirm.

I. BACKGROUND

This case arises out of a tragic plane crash that occurred at Linate Airport in Milan, Italy, on October 8, 2001. On that foggy morning, a private Cessna jet operated by Air Evex, a German charter company, made a wrong turn and taxied toward an active runway, causing it to collide with Scandinavian Airlines Flight 686, which was just taking flight. One hundred eighteen people died, including everyone on board both planes and four people on the ground, and others on the ground were injured.

In March 2003, a complaint was filed against Cessna Aircraft Company (Cessna) in the Southern District of Florida by the King family, acting as personal representatives of the estate of Jessica King (King Plaintiffs). Thereafter, 69 European plaintiffs (European Plaintiffs) brought suits against Cessna,

which were consolidated with the King Plaintiffs' case for administrative purposes. On October 21, 2005, the district court granted in part Cessna's motion to dismiss the case as to the European Plaintiffs on *forum non conveniens* grounds, denied in part the motion with regard to the King Plaintiffs, and stayed the King Plaintiffs' case pending resolution of Italian disputes relating to the European Plaintiffs. *King ex rel. Estate of King v. Cessna Aircraft Co.*, 405 F. Supp. 2d 1374, 1381 (S.D. Fla. 2005). After both groups of plaintiffs appealed, we vacated the district court's stay and dismissal orders and remanded the case. *King v. Cessna Aircraft Co.*, 505 F.3d 1160, 1173 (11th Cir. 2007). Without expressing any view on the correctness of the district court's *forum non conveniens* analysis, we instructed the district court to consider whether, knowing "it could not avoid dual proceedings by staying the *King* case, it might have dismissed all of the plaintiffs, including King, or allowed all of the plaintiffs to proceed here, or perhaps pursued some other avenue." *Id.*

On remand, Cessna renewed its motion to dismiss both the King Plaintiffs' and European Plaintiffs' complaints on the basis of *forum non conveniens*. The district court "elect[ed] to 'pursue some other avenue'" and, for the reasons it previously gave, granted in part the motion to dismiss with regard to the European Plaintiffs and denied it in part with regard to the King Plaintiffs. *King v. Cessna Aircraft Co.*, No. 03-20482, 2008 WL 276015, at *2 (S.D. Fla. Jan. 31, 2008). On February 11, 2008, Cessna filed a motion to amend the judgment, asking the district court to "certify its decision to dismiss the [European Plaintiffs] as a final judgment" pursuant to Fed. R. Civ. P. 54(b) and "include a certificate for interlocutory review pursuant

to 28 U.S.C. § 1292(b)" of the portion of the order denying the motion to dismiss the King Plaintiffs. The district court issued a final judgment pursuant to Rules 54 and 58, but denied Cessna's motion for certification under § 1292(b). The European Plaintiffs appealed their dismissal, and Cessna filed a cross-appeal of the order "to the extent said order . . . denied Cessna's motion to dismiss the claims of plaintiff Jack King."

II. JURISDICTION

Dismissal of a suit on the basis of *forum non conveniens* is a final, appealable order. *Sigalas v. Lido Mar., Inc.*, 776 F.2d 1512, 1516 (11th Cir. 1985). The district court did not consolidate the European Plaintiffs' case with the King Plaintiffs' case for all purposes, so the European Plaintiffs can appeal the dismissal of their case without waiting for a final determination of the King Plaintiffs' case. *See Lewis Charters, Inc. v. Huckins Yacht Corp.*, 871 F.2d 1046, 1048-49 (11th Cir. 1989). The district court's order is final as to the European Plaintiffs, so we have jurisdiction to review their appeal.

We do not, however, have jurisdiction to review Cessna's cross-appeal. Unlike the main appeal, the denial of a motion to dismiss on the basis of *forum non conveniens* is not a final order. *See Van Cauwenberghe v. Biard*, 486 U.S. 517, 529, 108 S. Ct. 1945, 1953 (1988). Furthermore, we cannot infer the district court intended to certify for immediate review the denial of the motion to dismiss the King Plaintiffs. The motion for entry of a Rule 54(b) certification filed by Cessna asked for a Rule 54(b) certification only with regard to the dismissal of the European Plaintiffs, and the

district court denied Cessna's request for certification of that denial under 28 U.S.C. § 1292(b). Cessna argues this Court has pendent appellate jurisdiction to review its cross-appeal. We disagree.

Pendent appellate jurisdiction is present when a nonappealable decision is "inextricably intertwined" with the appealable decision or when "review of the former decision [is] necessary to ensure meaningful review of the latter." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 51, 115 S. Ct. 1203, 1212 (1995); *see also Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1335 (11th Cir. 1999). Under these guidelines, such jurisdiction can be present even when the pendent appeal involves a party not in the main appeal.[1] Still, the Supreme Court has signaled that

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[1] The King Plaintiffs argued *Swint* absolutely bars "pendent party jurisdiction"—*i.e.*, pendent jurisdiction over a party not involved in the main appeal. However, the appropriate inquiry under *Swint* is not whether the pendent appeal involves a different *party* than is in the main appeal but whether the *issues* of the nonappealable decision are "inextricably intertwined" with the appealable decision or when "review of the former decision [is] necessary to ensure meaningful review of the latter." *See Swint*, 514 U.S. at 51, 115 S. Ct. at 1212. Indeed, the Supreme Court, our Circuit, and nearly every other court of appeals has exercised pendent appellate jurisdiction over closely related issues even when the pendent appeal involved parties not involved in the main appeal. *See Clinton v. Jones*, 520 U.S. 681, 707 n.41, 117 S. Ct. 1636, 1651 n.41 (1997) (affirming jurisdiction to review Paula Jones' cross-appeal as pendent to President Clinton's immunity appeal even though Jones' appeal involved a party who was not involved in the immunity appeal); *Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1358-59 (11th Cir. 2008) (exercising jurisdiction to review a grant of summary judgment pertaining to all defendants because it "provided the basis for the injunction" entered against and appealed by a few of the defendants); *see also Global NAPs, Inc.*

pendent appellate jurisdiction should be present only under rare circumstances. *See Johnson v. Jones*, 515 U.S. 304, 318, 115 S. Ct. 2151, 2159 (1995) (indicating pendent appellate jurisdiction is only appropriate "sometimes"); *Swint*, 514 U.S. at 49-50, 115 S. Ct. at 1211 (expressing concern that "a rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay . . . collateral orders into multi-issue interlocutory appeal tickets"). As noted in *Swint*, a more expansive exercise of such jurisdiction would undermine the statutory scheme governing interlocutory appeals. *Swint*, 514 U.S. at 45-50, 115 S.

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v. Mass. Dep't of Telecomms. & Energy, 427 F.3d 34, 43 (1st Cir. 2005); *Morley v. Ciba-Geigy Corp.*, 66 F.3d 21, 22 n.1 (2d Cir. 1995); *In re Tutu Wells Contamination Litig.*, 120 F.3d 368, 382 (3d Cir. 1997); *Mattox v. City of Forest Park*, 183 F.3d 515, 523-24 (6th Cir. 1999); *Greenwell v. Aztar Ind. Gaming Corp.*, 268 F.3d 486, 491 (7th Cir. 2001); *Eagle v. Morgan*, 88 F.3d 620, 628 (8th Cir. 1996); *Huskey v. City of San Jose*, 204 F.3d 893, 904 (9th Cir. 2000); *Moore v. City of Wynnewood*, 57 F.3d 924, 929 (10th Cir. 1995); *NAACP v. U.S. Sugar Corp.*, 84 F.3d 1432, 1436 (D.C. Cir. 1996).

In cases with the same factual scenario as *Swint*—an official immunity appeal in which there was an appeal by another party who could not assert official immunity—we have declared there was no "pendent party jurisdiction." *See, e.g., Hudson v. Hall*, 231 F.3d 1289, 1292 n.1 (11th Cir. 2000); *Harris v. Bd. of Educ. of Atlanta*, 105 F.3d 591, 595 (11th Cir. 1997) (per curiam); *Pickens v. Hollowell*, 59 F.3d 1203, 1208 (11th Cir. 1995). Although we interpreted *Swint* to bar pendent party jurisdiction under those circumstances, the Supreme Court left open the possibility for such jurisdiction in other, albeit narrow, contexts. *See Swint*, 514 U.S. at 5051, 115 S. Ct. at 1212 (declining to "definitively or preemptively settle . . . whether or when it may be proper . . . to review, conjunctively, related rulings that are not themselves independently appealable"); Charles Alan Wright & Arthur R. Miller, 16 Federal Practice & Procedure § 3937 (2008).

Ct. at 1209-11; *see also* 28 U.S.C. § 1292(b), (e); *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 679 (D.C. Cir. 1996) (noting the many factors that weigh against exercising pendent appellate jurisdiction). Our Circuit has found pendent appellate jurisdiction in only limited factual scenarios.

In *Fox v. Tyson Foods, Inc.*, we found there was pendent jurisdiction to review those portions of an otherwise nonappealable collective action order the district court relied on when denying the motion to intervene that was appealed. 519 F.3d 1298, 1302 (11th Cir. 2008); *see also Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1365 (11th Cir. 1997) (exercising pendent jurisdiction to review an otherwise nonappealable compel order because the appealed sanctions order was issued in part for the defendant's purported violation of the compel order). We expressly determined there was no jurisdiction, however, to review findings in the collective action order upon which the district court did not rely. *Fox*, 519 F.3d at 1302. In *United States v. Lopez-Lukis*, we exercised pendent appellate jurisdiction over an otherwise nonappealable order striking a paragraph of the indictment because the strike was "closely related to [the district court's] exclusion of the Government's evidence" that was on review. 102 F.3d 1164, 1167 n.10 (11th Cir. 1997). We reasoned that "review of the evidentiary ruling necessarily implicate[d] review of the order striking [the paragraph] from the indictment" because "[b]oth orders resulted from the same determination[.]" *Id.*

Importantly, we have found such jurisdiction did not exist when resolution of the nonappealable issue was not necessary to resolve the appealable one. *See*

Summit Med. Assocs., 180 F.3d at 1335 ("[W]e may resolve the Eleventh Amendment immunity issue here without reaching the merits of standing[, so t]hese issues are neither 'inextricably intertwined' nor 'necessary to ensure meaningful review' of one another."); *Moniz v. City of Fort Lauderdale*, 145 F.3d 1278, 1281 n.3 (11th Cir. 1998) ("Because we may resolve the qualified immunity issue in this case without reaching the merits of appellants' challenge to . . . standing, . . . we conclude that the latter issue . . . does not fall within our pendent appellate jurisdiction under *Swint*."); *Harris v. Bd. of Educ. of Atlanta*, 105 F.3d 591, 595 (11th Cir. 1997) (declining pendent appellate jurisdiction because the qualified immunity issue could be resolved "without reaching the merits of the remaining questions" raised by the parties).

In the Eleventh Circuit, we have never exercised pendent appellate jurisdiction to review an issue like the one raised by the cross-appeal. The district court did not base its decision of whether to dismiss the European Plaintiffs on its decision as to the King Plaintiffs. *See King ex rel. Estate of King*, 405 F. Supp. 2d at 1378-81 (cited by *King*, 2008 WL 276015, at *2); *cf. Fox*, 519 F.3d at 1302; *Chudasama*, 123 F.3d at 1365. The orders did not result from the same determination because, although some of the factors in the *forum non conveniens* analysis applied equally to both the European Plaintiffs and the King Plaintiffs, the district court's order clearly shows the analysis was conducted separately for both groups. *See King ex rel. Estate of King*, 405 F. Supp. 2d at 1378-81 (cited by *King*, 2008 WL 276015, at *2); *cf. Lopez-Lukis*, 102 F.3d at 1167 n.10. Furthermore, a determination of the propriety of the district court's refusal to dismiss the King Plaintiffs is not necessary to resolve the propriety

of its decision to dismiss the European Plaintiffs for *forum non conveniens*. *See Summit Med. Assocs.*, 180 F.3d at 1335; *Moniz*, 145 F.3d at 1281 n.3; *Harris*, 105 F.3d at 595. For these reasons, we will review the European Plaintiffs' appeal but we do not have jurisdiction to review Cessna's cross-appeal.

III. STANDARD OF REVIEW

A district court's *forum non conveniens* determination "may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257, 102 S. Ct. 252, 266 (1981). Specifically, when applying abuse of discretion review, the Supreme Court has instructed appellate courts not to "los[e] sight of this rule, and substitute[their] own judgment for that of the District Court." *Id.*, 102 S. Ct. at 266-67.

IV. DISCUSSION

When it made its motion for dismissal on grounds of *forum non conveniens*, Cessna must have demonstrated "that (1) an adequate alternative forum [was] available, (2) the public and private factors weigh[ed] in favor of dismissal, and (3) the plaintiff[s could] reinstate [their] suit in the alternative forum without undue convenience or prejudice." *See Leon v. Million Air, Inc.*, 251 F.3d 1305, 1310-11 (11th Cir. 2001). The Supreme Court outlined a number of private and public interest factors for courts to consider in a *forum non conveniens* determination. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09, 67 S.

Ct. 839, 843 (1947). In *Gilbert*, the Court listed these factors in detail:

> An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.
>
> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can

> learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Id. (footnote omitted).

These factors are not exhaustive or dispositive, and courts are free to be flexible in responding to cases as they are presented. *Sigalas*, 776 F.2d at 1519. A trial court will look at the private interests first and then, if the balance of the private interests are found "to be in equipoise or near equipoise," it will "determine whether or not factors of *public* interest tip the balance in favor of a trial in a foreign forum." *See La Seguridad v. Transytur Line*, 707 F.2d 1304, 1307 (11th Cir. 1983).

A. Availability and Adequacy of the Italian Forum

The defendant bears the burden of demonstrating an adequate alternative forum is available. "Availability and adequacy warrant separate consideration." *Leon*, 251 F.3d at 1311. Ordinarily, an alternative forum is available "when the defendant is 'amenable to process' in the other jurisdiction." *Piper*, 454 U.S. at 255 n.22, 102 S. Ct. at 265 n.22 (citation omitted). An alternative forum is adequate if it provides for litigation of the subject matter of the dispute and potentially offers redress for plaintiffs' injuries. *See id.* "An adequate forum need not be a perfect forum," but it must provide a satisfactory

remedy. *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283 (11th Cir. 2001).

In this case, Italy is an available forum because Cessna is willing to submit to jurisdiction and is amenable to process there. In declaring Italy an adequate forum, the district court noted Italian courts have addressed similar cases and awarded satisfactory remedies. Both parties agree Italian law provides the rule of decision regardless of whether the claims are litigated in Milan or Miami. Although they disagree over whether Cessna will be found liable to the European Plaintiffs under Italian law, Italian tort law provides the plaintiffs with comparable remedies for their injuries. *See, e.g., Membreno v. Costa Crociere S.P.A.*, 425 F.3d 932, 937 (11th Cir. 2005) (recognizing Italy as an adequate forum for tort claims). For these reasons, we find the district court did not abuse its discretion in finding Italy was an adequate alternative forum for the European Plaintiffs' claims.

B. Private Interest Factors

With regard to weighing the private interests, a "plaintiff's choice of forum should rarely be disturbed." *Gilbert*, 330 U.S. at 508, 67 S. Ct. at 843. The presumption in favor of the plaintiff's forum choice is strongest when the plaintiff is a United States citizen, resident, or corporation. *See SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1101 (11th Cir. 2004). A foreign plaintiff's choice of forum, however, is a weaker presumption that receives less deference. *Piper*, 454 U.S. at 256, 102 S. Ct. at 266; *SME Racks*, 382 F.3d at 1101; *Ford v. Brown*, 319 F.3d 1302, 1307 (11th Cir. 2003); *Leon*, 251 F.3d at 1315. The European Plaintiffs point out a

majority of them are from countries having bilateral treaties with the United States that accord them "no less favorable" access to U.S. courts to redress injuries caused by American actors.[2] Thus, they argue, the district court erred in giving their choice less deference. We disagree.

The Second Circuit in *Farmanfarmaian v. Gulf Oil Corp.*, 588 F.2d 880 (2d Cir. 1978), concluded a foreigner's right to sue in the United States is not of a lesser magnitude than an American's right when a treaty exists between the two countries giving a foreigner "no less favorable" access to the other country's courts. *Id.* at 882. However, in a later case, *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64 (2d Cir. 2003), the Second Circuit further

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[2] The European Plaintiffs represent 21 Swedish citizens, 19 Italian citizens, 19 Danish citizens, 4 Finnish citizens, 3 Norwegian citizens, 1 Romanian citizen, and 1 British citizen. There is also one Italian personal injury claimant. Those representing the Italian and Danish decedents and the Italian personal injury claimant—39 of the 69 plaintiffs—are entitled by treaty to "no less favorable" treatment than an American national when suing in U.S. courts. *See* Treaty of Friendship, Commerce and Navigation, U.S.-Italy, art. V.4, July 26, 1949, 63 Stat. 2255, 1949 WL 37628; Treaty of Friendship, Commerce and Navigation, U.S.-Denmark, arts. V.1 & XXII.1, July 30, 1961, 12 U.S.T. 908, 1961 WL 62672. Eight others—representing the Finns, Norwegians, and Romanian—are entitled to "freedom of access" or "access" to U.S. courts. Treaty of Friendship, Commerce and Consular Rights, U.S.-Finland, art. I, Aug. 10, 1934, 49 Stat. 2659, 1934 WL 29046; Treaty of Friendship, Commerce and Consular Rights, U.S.-Norway, art. I, Sept. 15, 1932, 47 Stat. 2135, 1932 WL 31050; Agreement on Trade Relations between the United States and Romania, U.S.-Romania, arts. IV.2 & V.2, Aug. 3, 1975, 26 U.S.T. 2605, 1975 WL 165548.

explained the level of deference that would be given to a foreign plaintiff's choice of forum:

> Even assuming that, by treaty, plaintiffs were entitled to access American courts on the same terms as American citizens . . ., our case law does not support plaintiffs' assertion that such a treaty would require that their choice of forum be afforded the same deference afforded to a U.S. citizen bringing suit in his or her home forum. Such a proposition impermissibly conflates citizenship and convenience . . . .
>
> A court considering a motion for dismissal on the grounds of *forum non conveniens* does not assign "talismanic significance to the citizenship or residence of the parties," . . . and there is no inflexible rule that protects U.S. citizen or resident plaintiffs from having their causes dismissed for *forum non conveniens*. . . .
>
> [A]ppellants cannot successfully lay claim to the deference owed an American citizen or resident suing in her home forum. Plaintiffs are only entitled, at best, to the lesser deference afforded a U.S. citizen living abroad who sues in a U.S. forum.

Id. at 73 (citations omitted). This analysis makes clear that although citizenship often acts as a proxy for convenience in the *forum non conveniens* analysis, the appropriate inquiry is indeed convenience.

In this case, then, the lesser deference given by the district court to the European Plaintiffs' choice of forum was consistent with the treaty obligations of the

United States. Just as it would be less reasonable to presume an American citizen living abroad would choose an American forum for convenience, so too can we presume a foreign plaintiff does not choose to litigate in the United States for convenience. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430, 127 S. Ct. 1184, 1191 (2007) ("When the plaintiff's choice is not its home forum, . . . the presumption in the plaintiff's favor 'applies with less force,' for the assumption that the chosen forum is appropriate is in such cases 'less reasonable.'" (quoting *Piper*, 454 U.S. at 255-56, 102 S. Ct. at 266)). Accordingly, the district court did not abuse its discretion by according the European Plaintiffs' choice of forum less deference.

Other relevant private interest factors include "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witness; . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gilbert*, 330 U.S. at 508, 67 S. Ct. at 843. The location of much of the evidence of this case is in Italy. Although some evidence has already been gathered and the crash reports have been translated, the district court pointed out that Cessna disputes the tort element of causation based on intervening factors, the evidence of which can only be obtained from Italian witnesses. *See Ford*, 319 F.3d at 1308 ("Perhaps the most important 'private interest' of the litigants is access to evidence."); *see also Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1430 n.2 (11th Cir. 1996) (rebuffing the contention that a French accident report was an adequate substitute for defendant's desire to present live French witnesses to establish the cause of a

foreign airplane crash). The district court also found there were "practical problems" that complicated trying the case in the United States, including differing liability issues and damages among the Plaintiffs and the fact that some Plaintiffs have already litigated and continue to litigate a similar suit in Italy concerning the crash.

C. Public Interest Factors

After discussing the private interests and having found them in or near equipoise, the district court analyzed the public interest factors weighing in favor of dismissal of the European Plaintiffs' case. Public interest factors include each forum's interest in hearing the case, the administrative burdens placed on the Court in hearing the case, and the need to apply foreign law. *See Gilbert*, 330 U.S. at 508-09, 67 S. Ct. at 843. The district court found that Italy has a strong interest in resolving this case, especially because the tragic event occurred on Italian land. The court expressed concern that evaluating liability and damages issues as to each of these European Plaintiffs would place a heavy burden on its limited resources. Finally, after conducting a two-day Italian law hearing, the court concluded application of Italian law to the numerous issues in this case weighed in favor of dismissal. *See Sigalas,* 776 F.2d at 1519 ("The need to resolve and apply foreign law should 'point the trial court towards dismissal.'" (quoting *Piper*, 454 U.S. at 260, 102 S. Ct. 252)).

In the trial court's analysis, these public interest factors tipped the balance in favor of a trial in Italy for the European Plaintiffs' case. The district court engaged in a thorough, reasonable analysis of the

relevant private and public interest factors, and it did not abuse its discretion in finding the factors weighed in favor of dismissal of the European Plaintiffs.

D. Conditions of the Dismissal

We modify the dismissal order to require Cessna to submit to the jurisdiction of the Italian courts and waive the statute of limitations. *See* 28 U.S.C. § 2106 (giving appellate courts the authority to modify). We further modify the dismissal order to provide that any case dismissed pursuant to the district court's order may be reinstated in the event that jurisdiction to entertain such a case is rejected by a final decision of a court in Italy. We note that conditioning the dismissal does not destroy finality, nor leave the case pending in the district court. *See Leon*, 251 F.3d at 1316; *Sigalas*, 776 F.2d at 1515-16.

V. CONCLUSION

Echoing the district judge's sentiments, we are extremely sympathetic to those affected by this tragic airplane crash. Still, our sympathy for the victims and their families cannot alter our conclusion that the district court did not abuse its discretion in dismissing the European Plaintiffs on the grounds of *forum non conveniens*. Accordingly, the district court's order is modified as provided in this opinion and, as modified, is affirmed.

AFFIRMED IN PART, DISMISSED IN PART.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Case Number: 03-20482-CIV-MORENO

[Filed January 31, 2008]

JACK KING, as Personal Representative of the Estate of JESSICA KING, *et al.*,

Plaintiffs,

vs.

CESSNA AIRCRAFT CO., a Kansas corporation,

Defendant.

ORDER ON RENEWED MOTION TO DISMISS FOR *FORUM NON CONVENIENS*

This case[1] is now before the Court on remand from the United States Court of Appeals for the Eleventh Circuit's order and mandate in King v. Cessna Aircraft Co., 505 F.3d 1160 (11th Cir. 2007), which vacated this Court's October 2005 Order on *Forum Non Conveniens*,

[1] The companion case is Brega v. Cessna Aircraft Co., No. 03-22669-CIV-MORENO.

King v. Cessna Aircraft Co., 405 F. Supp. 2d 1374 (S.D. Fla. 2005) that stayed the King case and dismissed the foreign Plaintiffs. The Eleventh Circuit remanded the case to this Court for a determination as to "what, if anything, the court might have done differently had it known that it could not stay proceedings in the King case." King, 505 F.3d at 1173. The Court responds that it would have reached the same conclusion in its *forum non conveniens* analysis. Accordingly, for the reasons stated in this Court's previous Order, King v. Cessna Aircraft Co., 405 F. Supp. 2d 1374, the foreign Plaintiffs are dismissed, and Plaintiff Jack King shall proceed in this Court.

BACKGROUND[2]

These cases stem from the deadliest aviation disaster in Italian history. On a foggy morning in October of 2001 at the Linate airport in Milan, Italy, a private Cessna jet, operated by Air Avex, collided with a Scandinavian Air Systems jet killing one hundred and eighteen people. In addition to the continuing litigation in Italian courts, the personal representatives of the estates of sixty-nine victims and one personal injury claimant have filed lawsuits in the Southern District of Florida against the Defendant. All but one of the Plaintiffs are European citizens. The remaining Plaintiff, Jack King, is the personal representative of the estate of his daughter, Jessica King, an American citizen.

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[2] For a more comprehensive case history, see the Eleventh Circuit's opinion, King v. Cessna Aircraft Co., 505 F.3d 1160, 63-65 (11th Cir. 2007).

The Defendant filed motions to dismiss all of the actions on grounds of *forum non conveniens*. The Court initially denied those motions. The Court further denied the Defendant's motion for reconsideration. However, in response to changed circumstances within the litigation, the Court invited the parties to re-brief Cessna's motion for reconsideration based on the issue of *forum non conveniens*. After considering the parties' briefs and hearing oral argument on the matter, the Court issued an Order on *Forum Non Conveniens* in which it granted in part the Defendant's motion for reconsideration. King, 405 F. Supp. 2d 1374. The Court dismissed the actions of the foreign Plaintiffs based on *forum non conveniens* but stayed the King case pending the resolution of the litigation underway in the Italian courts. Id. at 1381.

On appeal, the Eleventh Circuit affirmed this Court's decision that Jessica King was a citizen of the State of California for purposes of establishing subject matter jurisdiction based on diversity, but reversed this Court's indefinite stay of the King case. King, 505 F.3d at 1173. The Eleventh Circuit remanded the case to this Court to determine what impact, if any, the stay of the King case had on the Court's decision to dismiss the foreign Plaintiffs. Id.

DISCUSSION

Specifically, the question presented to this Court by the Eleventh Circuit is whether, "[i]f the district court had known it could not avoid dual proceedings by staying the King case," it would have (1) "dismissed all of the plaintiffs, including King," or (2) "allowed all of the plaintiffs to proceed here," or (3) "pursued some other avenue." Id. at 1173. Further, the Eleventh

Circuit clarified that it neither "express[es] nor impl[ies] any view on the correctness of any options that the district court may choose on remand." Id. Upon consideration of these options, the Court elects to "pursue some other avenue." The Eleventh Circuit aptly noted that through the Court's previous Order, which "stay[ed] the King case and nudg[ed] the foreign plaintiffs toward litigation in a more appropriate forum," the Court attempted to "avoid wasteful and duplicative litigation." Id. at 1173. Although the Court recognizes that avoiding duplicative litigation by staying the King case was one consideration in its decision to dismiss the foreign Plaintiffs, it did not so heavily impact the Court's *forum non conveniens* analysis that vacating the stay would have precluded the dismissal of the foreign Plaintiffs. Accordingly, for the reasons stated in this Court's previous opinion, King v. Cessna Aircraft Co., 405 F. Supp. 2d 1374 (S.D. Fla. 2005), Defendant's Motion to Dismiss for *Forum Non Conveniens* is granted in part. The foreign Plaintiffs are dismissed, and Plaintiff Jack King shall proceed before this Court.

DONE AND ORDERED in Chambers at Miami, Florida, this 31st day of January, 2008.

/s/
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

APPENDIX C

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[Filed October 24, 2007]

No. 06-10519

D. C. Docket No. 03-20482-CV-FAM

JACK KING, as personal representative of the Estate of Jessica King, deceased, ANETTE FORSMAN, individually and/or personal representative and/or as the Person legally authorized under applicable law to bring this wrongful death case for herself, all potential beneficiaries and/or the Estate of Robin Forsman, deceased, et al.,

Plaintiff's-Appellants,

versus

CESSNA AIRCRAFT COMPANY, a foreign corporation,

Defendant-Appellee.

No. 06-10994

D. C. Docket No. 03-22669-CV-FAM

BARBARA BREGA, individually, and/or as Personal Representative and/or as the persons legally authorized under applicable law to bring this wrongful death case for themselves, all potential beneficiaries and/or the Estate of Stefano Romanello, deceased,

Plaintiff-Appellant,

versus

CESSNA AIRCRAFT CO., a Kansas corporation, JEFFERSEN SANDERSON, INC., a Delaware corporation, d.b.a. Jeppesen Company,

Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Florida

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(October 24, 2007)

Before CARNES and WILSON, Circuit Judges, and STAGG,* District Judge.

CARNES, Circuit Judge:

These cases arise out of a tragic accident that occurred one foggy morning in October of 2001 at the Linate airport in Milan, Italy. A private Cessna jet operated by Air Evex, a German charter company, made a wrong turn, taxiing toward an active runway. After air traffic controllers apparently failed to make the problem clear to the plane's pilots, the Air Evex jet collided with a Scandinavian Air Systems jet that was just taking flight. One hundred and eighteen people died, including everyone on board both planes and four people on the ground. Another person was seriously injured. It was the deadliest aviation disaster in Italian history.

In addition to litigation that is ongoing in the Italian courts, lawsuits were filed in the Southern District of Florida against Cessna Aircraft Company, an American corporation, by the estates of seventy victims and one personal injury claimant. The decedents in sixty-nine of the estates were European citizens, as is the personal injury claimant. We will be calling them the European plaintiffs. The remaining plaintiff is Jack King, the personal representative of the estate of his daughter, Jessica King, an American citizen.

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* Honorable Tom Stagg, United States District Judge for the Western District of Louisiana, sitting by designation.

The district court ordered all of the complaints that had been filed before it, except one (which was the only complaint that stated a contractual claim), consolidated into a master complaint for administrative purposes. Cessna filed a motion to dismiss in favor of the Italian courts on grounds of forum non conveniens. The district court eventually granted that motion as to all of the European plaintiffs. While the district court denied the motion as to the King plaintiff, it did grant a stay of proceedings in that case pending resolution by the Italian courts of Italian law issues relating to Cessna's liability and any damages the company might owe the plaintiffs. The district court then de-consolidated the cases. We re-consolidated them for purposes of appeal.

This appeal by all seventy-one plaintiffs does not involve any liability or damages issues. Instead, it presents a threshold question of appellate jurisdiction and a question of subject matter jurisdiction. The non-jurisdictional issue presented is whether the district court abused its discretion in dismissing the European plaintiffs' actions on forum non conveniens grounds and staying further proceedings in the King case.

I.

Cessna filed its motions to dismiss all of the lawsuits on forum non conveniens grounds in January and March of 2004. The district court initially denied those motions. In an order issued in October 2004, the court concluded that Jack King, a citizen of the United States, deserved the full deference to his choice of forum normally afforded domestic plaintiffs. Although it concluded that the foreign plaintiffs were not

entitled to that same deference, the court reasoned that it made little sense to dismiss the foreign plaintiffs' suits while retaining King's lawsuit. Doing that would result in two sets of lawsuits involving the same accident proceeding in different jurisdictions, ostensibly in the name of convenience. The court noted that the plaintiffs' theory of liability turned on acts at Cessna's corporate headquarters in the United States, and it found that, while the dispute was governed by the substantive law of Italy, the Italian law issues were "fairly simple." After balancing the relevant public and private interest factors, the court concluded that Cessna had "failed to show that a material injustice would be manifest" if the case proceeded to trial in the United States.

Cessna moved for reconsideration. The district court denied that motion as well, but had some doubt about its subject matter jurisdiction based on the domicile of Jessica King at the time of her death. The court invited Cessna to file a motion to dismiss on that ground, which it did. After considering that motion to dismiss and the plaintiffs' opposition, the district court concluded that the presence of the King plaintiff did not destroy the diversity of citizenship which was necessary to the court's subject matter jurisdiction over the lawsuit.

After the district court had denied Cessna's motions to dismiss, and as the litigation progressed, the court found that the cases had changed in two ways relevant to this appeal. First, the court perceived that the plaintiffs' claims had evolved from a theory of liability that focused on acts and omissions by Cessna at its corporate headquarters in the United States to a theory dependent on acts by Cessna's agents at the

Linate airport in Milan. This shift in the factual locus of liability, combined with changes in Cessna's defense strategy, convinced the court that the Italian law issues were going to be more complicated than it had thought. The second way in which the circumstances had changed is that Cessna presented the district court with evidence that some of the plaintiffs in the cases before it, including Jack King, were litigating a civil action in Italy against Air Evex and various Italian governmental entities.

Responding to these changed circumstances, the district court asked the parties to re-brief Cessna's motion for reconsideration of the forum non conveniens issue. After considering those briefs and hearing argument on the matter, the court issued an order in October of 2005 in which it re-weighed the public and private forum non conveniens factors and concluded that a dismissal based on forum non conveniens was warranted as to the actions of all of the foreign plaintiffs but not as to Jack King's lawsuit.

The district court's order dismissing the foreign plaintiffs' actions on forum non conveniens grounds was based on the combined effect of several factors. The nature of the claims and defense strategy had changed, complicating the Italian law issues and making Italy an increasingly attractive forum for resolution of the disputes. The fact that some of the plaintiffs were already litigating in Italy made parallel litigation unavoidable.

Still, the court decided not to dismiss the King lawsuit on forum non conveniens grounds. The difference between King and the European plaintiffs, the court explained, is that, as a United States citizen

plaintiff, King is entitled to a presumption in favor of his chosen forum. Moreover, it noted, much of the evidence relating to King's claims either already had been discovered in the United States or was likely to be found here.

Even though the district court thought King was entitled to litigate his lawsuit here, the court was not ready to proceed with it. Instead, the court decided to stay the King case pending resolution of the related litigation in the Italian courts, which hopefully would provide answers to some of the Italian law issues. By staying the case, the district court reasoned that it could reduce the cost of duplicative litigation, increase the likelihood that it would resolve the Italian law issues correctly, and provide King with the forum to which he was entitled.

This is the appeal of the district court's order by the European plaintiffs dismissing their actions on forum non conveniens grounds, and King's appeal of the order staying proceedings in his case pending the outcome of the Italian litigation.

II.

We begin our analysis with a review of our jurisdiction to hear this appeal because, if the requirements for appellate jurisdiction are not met "we cannot review whether a judgment is defective, not even where the asserted defect is that the district court lacked jurisdiction." United States v. Machado, 465 F.3d 1301, 1306 (11th Cir. 2006). On February 8, 2006, we issued the following jurisdictional question:

> Whether the district court's November 1, 2005, order dismissing the case as to the 69 foreign plaintiffs and staying the case as to plaintiff Jack King and the December 14, 2005, order denying reconsideration are final and appealable? See 28 U.S.C. § 1291; Gillespie v. United States Steel Corp., 379 U.S. 148, 152, 85 S. Ct. 308, 311, 13 L.Ed.2d 199 (1964); FOGADE v. ENB Revocable Trust, 263 F.3d 1274, 1285 (11th Cir. 2001); Sigalas v. Lido Mar., Inc., 776 F.2d 1512, 1516 (11th Cir. 1985); Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365, 1368–69 (11th Cir. 1983); Broussard v. Lippman, 643 F.2d 1131, 1133 (5th Cir. Unit A Apr. 1981).

Cessna responded with a motion to dismiss the appeal, [Appellee's Mot. to Dismiss Appeal] contending that the district court's order was not a final judgment as to all parties, because the court had stayed rather than dismissed King's claims.

The general rule is that a stay is not a final disposition, and thus not immediately appealable. See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 10 n.11, 103 S. Ct. 927, 934 n.11 (1983). However, there is an exception for stays that put a plaintiff "effectively out of court," and in applying that exception we have held that a stay order that is immoderate and involves a protracted and indefinite period of delay is final and appealable under 28 U.S.C. § 1291. Id; see also Am. Mfrs. Mut. Ins. Co. v. Edward D. Stone, Jr. & Assoc., 743 F.2d 1519, 1523–24 (11th Cir. 1984); CTI-Container Leasing Corp. v. Uiterwyk Corp., 685 F.2d 1284, 1287–88 (11th Cir. 1982).

Cessna attempts to escape the force of those precedents by equating the principle they apply to the "death knell" doctrine, see generally Kmart Corp. v. Arondo, 123 F.3d 297, 300 (5th Cir. 1997). It argues that we need not follow those precedents because the Supreme Court's decision in Quackenbush v. Allstate Insurance Co., 517 U.S. 706, 116 S. Ct. 1712 (1996), sounded the death knell of the death knell doctrine.

The Supreme Court first recognized the doctrine at issue in this case, the "effectively out of court" version of finality, in Idlewild Bon Voyage Liquor Corp. Epstein, 370 U.S. 713, 715 n.2, 82 S. Ct. 1294, 1296 n.2 (1962). In that case a liquor distributor filed a complaint in federal court seeking a declaratory judgment that the New York Alcoholic Beverage Control Law would be unconstitutional as it was applied. Id. at 714, 82 S. Ct. at 1295. The distributor asserted a statutory right to have its case heard by a three judge panel. Id. The district court refused to convene a three judge court and stayed the lawsuit based on the Pullman abstention doctrine, under which federal courts abstain from resolving constitutional disputes where a state court's clarification of its own law might render a constitutional ruling unnecessary. Id. at 714, 82 S. Ct. at 1295–96; see R.R. Comm'n v. Pullman Co., 312 U.S. 496, 501–02, 61 S. Ct. 643, 645–46 (1941). The Second Circuit found that it had jurisdiction over the appeal and held that the district court had erred in refusing to convene a three judge panel, but nonetheless dismissed the appeal for reasons not relevant to our discussion. Idlewild, 370 U.S. at 714, 715 n.2, 82 S. Ct. at 1296 & n.2. On review the Supreme Court noted: "The Court of Appeals properly rejected the argument that the order of the District Court 'was not final and

hence unappealable under 28 U.S.C. §§ 1291, 1292,' pointing out that 'appellant was effectively out of court.'" Id. at 715 n.2, 82 S. Ct. at 1296 n.2. The Court offered no further explanation. Id.

Two decades later in Moses H. Cone, the Supreme Court applied Idlewild's "effectively out of court" doctrine. Moses H. Cone, 460 U.S. at 9–10, 103 S. Ct. at 933–34. There a federal district court had stayed an action under the Colorado River abstention doctrine, which permits a federal court to abstain from exercising concurrent jurisdiction with a state court under certain exceptional circumstances. Id. at 4, 103 S. Ct. at 931; see Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817–21, 96 S. Ct. 1236, 1246–48 (1976). The Fourth Circuit reversed the stay, and the Supreme Court affirmed. Moses H. Cone, 460 U.S. at 4, 103 S. Ct. at 931. In doing so, the Court explained that since it had found that it had jurisdiction over the Idlewild appeal, it must also have jurisdiction over the Moses H. Cone appeal, because "the argument for finality of the District Court's order is even clearer" under Colorado River abstention than under Pullman abstention. Id. at 10, 103 S. Ct. at 933. That is so because "[a] district court stay pursuant to Pullman abstention is entered with the expectation that the federal litigation will resume in the event that the plaintiff does not obtain relief in state court on state-law grounds." Id. at 10, 103 S. Ct. at 934. By contrast, a stay under Colorado River usually contemplates there will be no further litigation in the federal forum. Id.

The Supreme Court in Moses H. Cone did clarify that Idlewild had not created a broad exception to "the usual rule that a stay is not ordinarily a final decision

for purposes of § 1291, since most stays do not put the plaintiff 'effectively out of court.'" Id. at 10 n.11, 103 S. Ct. at 934 n.11. What it was doing in Moses H. Cone, the Court explained, was no more than extending the Idlewild decision to cases involving Colorado River abstention "or a closely similar doctrine." Id.

The Court also made clear in Moses H. Cone that the "effectively out of court" doctrine was not the same thing as the "death knell" doctrine, which by then had been scrapped. Id. The difference, the Court explained, is that in a "death knell" case "the order sought to be appealed ha[s] no legal effect on the named plaintiff's ability to proceed with his individual claim in federal court," although the plaintiff may elect not to continue. Id. For example, when a court refuses to certify a class, the named plaintiff has a legal right to proceed, even though the economic incentive to do so has been diminished. Id. By contrast, in a case where the district court's order puts the plaintiff "effectively out of court" continued federal court litigation is not an option. "There is an obvious difference between a case in which the plaintiff himself may choose not to proceed, and a case in which the district court refuses to allow the plaintiff to litigate his claim in federal court." Id.

Finally came the Quackenbush case, in which the Supreme Court examined the appealability of an abstention-based remand order entered under the Burford abstention doctrine, under which federal courts may dismiss certain cases in deference to complex state administrative procedures. Quackenbush, 517 U.S. at 709, 116 S. Ct. at 1717; Burford v. Sun Oil Co., 319 U.S. 315, 333 n.29, 63 S. Ct. 1098, 1107 n.29 (1943). The Court concluded that

the "order remanding on grounds of Burford abstention is in all relevant respects indistinguishable from the stay order we found to be appealable in Moses H. Cone." 517 U.S. at 714, 116 S. Ct. at 1719. The "relevant respects" the Court identified were that the order put the litigants "effectively out of court" and that "it conclusively determine[d] an issue that [was] separate from the merits, namely, the question whether the federal court should decline to exercise its jurisdiction in the interest of comity and federalism." Id. at 714, 116 S. Ct. at 1719–20.

Our Circuit has had several opportunities to apply the "effectively out of court" doctrine. See Stone, 743 F.2d at 1522–24; CTI-Container Leasing Corp., 685 F.2d at 1287–88; Hines v. D'Artois, 531 F.2d 726, 730–32 (5th Cir. 1976). In Hines, which was issued after the Supreme Court's decision in Idlewild but before its decisions in Moses H. Cone and Quackenbush, we held that we had jurisdiction over an appeal from a district court order staying litigation in an employment discrimination lawsuit until the plaintiffs filed a complaint with the Equal Employment Opportunity Commission and pursued it to final EEOC action. Hines, 531 F.2d at 728. In CTI-Container, also decided before Moses H. Cone, we found that we had jurisdiction over an order staying a lawsuit pending a determination by the Iran-United States Claims Tribunal of its jurisdiction to hear the claims raised in that lawsuit. CTI-Container, 685 F.2d at 1286, 1288.

In Stone we had our first opportunity to apply the Idlewild doctrine in light of the Moses H. Cone decision. Stone, 743 F.2d at 1523. The district court in Stone had entered a stay pending the resolution of a

previously filed state action. Id. at 1521. Both of the "parties acknowledge[d] that the state lawsuit will not decide the issues presented in [the plaintiff's] federal claim." Id. at 1523. We held that we have jurisdiction over litigants placed "effectively out of court" even where a "state decision will not have res judicata effect on the merits of [the plaintiff's] federal claim." Id.

We have yet to address the effect of the Quackenbush decision on the scope of Moses H. Cone. Four years after Quackenbush, we did on facts similar to those here vacate as "immoderate" a stay of a case pending the resolution of a related one in another country. See Ortega Trujillo v. Conover & Co. Commc'ns, 221 F.3d 1262, 1264–65 (11th Cir. 2000). However, our Trujillo opinion did not recognize any jurisdictional issue, much less explain why we had jurisdiction to decide the appeal. See generally id. The implication of our Trujillo decision—that we have jurisdiction in this situation—does not bind us, because the prior precedent rule does not extend to implicit jurisdictional holdings. See Okongwu v. Reno, 229 F.3d 1327, 1330 (11th Cir. 2000). We are free to decide the issue here, just as though there were no Trujillo decision, but we reach the same conclusion.

Applying the "effectively out of court" doctrine to the facts before us, it is apparent that King is at least as "effectively out of court" as the plaintiff in Idlewild was. The only notable difference between this case and Idlewild is that the stay in this case was issued in favor of foreign litigation, while the stay in Idlewild was issued in favor of state court litigation. The question, then, is whether that distinction matters to application of the "effectively out of court" exception to the finality rule of appellate jurisdiction.

Cessna, of course, contends that it does matter. It argues that "[f]or purposes of appealability, the significance of abstention doctrines based on federalism is that generally, when a federal court abstains in deference to a state court or [state] regulatory agency, the abstention necessarily ends the federal court's involvement with the suit." (quotation marks and alternations in original omitted). That is true, Cessna says, because the resulting judgment in state court will often have res judicata effect on any later federal litigation. This is a sophisticated argument, but not one that can be squared with the Idlewild decision.

If the Idlewild doctrine were confined to cases in which abstention necessarily will end federal court involvement in the lawsuit, or generally does so, the Supreme Court was mistaken about the disposition of that very case, and for our purposes the Supreme Court never makes a mistake. In Idlewild the district court had stayed the federal litigation based on Pullman abstention. See Moses H. Cone, 460 U.S. at 9, 103 S. Ct. at 933. As the Supreme Court later reminded us in Moses H. Cone, the Pullman doctrine is not one of the state court abstention doctrines that is likely to result in a res judicata effect on subsequent federal litigation. Id. at 10, 103 S. Ct. at 934. Instead, "[a] district court stay pursuant to Pullman abstention is entered with the expectation that the federal litigation will resume in the event that the plaintiff does not obtain relief in state court on state law grounds." Id. If, as Cessna argues, the Idlewild doctrine did not apply to cases in which "the expectation [is] that the federal litigation will resume" should the plaintiff be unhappy with the state court

results, the Supreme Court would have reached the opposite jurisdictional holding in Idlewild itself.

Cessna's characterization of the "effectively out of court" exception could only be correct if Moses H. Cone or Quackenbush overturned Idlewild. Neither did. Both indicate that Idlewild remains good law. See id. at 10 n.11 ("This answers the dissent's argument that Idlewild was overruled. . . ." (citations omitted)); Quackenbush, 517 U.S. at 713, 116 S. Ct. at 1719 (referring to its holding as "this reliance on Idlewild"). We can conclude that the Supreme Court meant what Cessna says it did only if we assume that the Supreme Court overlooked a significant fact in Idlewild, discovered that oversight in Moses H. Cone, and then misstated what it had done on two later occasions.

Even if we wanted to make such a dubious assumption, we would be barred from doing so for two reasons. The first is that we have held even after Moses H. Cone that the Idlewild "effectively out of court" doctrine applies to stays in which the other lawsuit will not decide the issues presented in the federal case. Stone, 743 F.2d at 1523. We must follow our Stone precedent until it is clearly overruled by either this Court sitting en banc or by the Supreme Court. Main Drug, Inc. v. Aetna U.S. Healthcare, Inc., 475 F.3d 1228, 1230 (11th Cir. 2007). Even if we were to conclude that Cessna's reading of Moses H. Cone and Quackenbush is a viable one, "we are not at liberty to disregard binding [circuit] case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court." Fla. League of Prof'l Lobbyists, Inc. v. Meggs, 87 F.3d 457, 462 (11th Cir. 1996).

The second reason we cannot hold that Moses H. Cone or Quackenbush implicitly overruled the Idlewild decision is that the Supreme Court has repeatedly instructed us that: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484, 109 S. Ct. 1917, 1921–22 (1989); accord, e.g., Hohn v. United States, 524 U.S. 236, 252–53, 118 S. Ct. 1969, 1978 (1998); Agostini v. Felton, 521 U.S. 203, 237, 117 S. Ct. 1997, 2017 (1997).

Where this leaves us is that the "effectively out of court" exception to the final judgment rule is not categorically inapplicable where a stay has been entered in favor of foreign court litigation. Its application in a particular case depends on the formula enunciated in Quackenbush: Whether the litigant has been placed "effectively out of court," which will happen when a federal court stays its hand to allow another court to assume partial jurisdiction over the merits of the suit. Quackenbush, 517 U.S. at 714, 116 S. Ct. at 1719–20. In making that determination we must be careful not to breathe new life into the moribund "death knell" doctrine by permitting an appeal where the "order sought to be appealed ha[s] no legal effect on the named plaintiff's ability to proceed with his individual claim[s] in federal court." Moses H. Cone, 460 U.S. at 10 n.11, 103 S. Ct. at 934 n.11.

Jack King's appeal fits within the "effectively out of court" exception to the final judgment rule. He has for all practical effects been put out of court indefinitely

while litigation whose nature, extent, and duration are unknown, is pending in Italy. The district court has held its hand while Italian courts assume or continue what amounts to jurisdiction over the merits of the lawsuit. Their decision of Italian law issues will be followed by the district court. The stay order does have the legal effect of preventing King from proceeding with his claims in federal court for an indefinite period of time, potentially for years. Because he has been effectively put out of court, we have jurisdiction to review the order that did put him out.

We do not mean that there are no differences between federalism and international comity for purposes of evaluating the merits of a stay order, as distinguished from deciding whether appellate jurisdiction exists to review the stay order. As Cessna has reminded us, we have previously observed that: "The relationship between the federal courts and the states (grounded in federalism and the Constitution) is different from the relationship between federal courts and foreign nations (grounded in the historical notion of comity)." Posner v. Essex Ins. Co., 178 F.3d 1209, 1223 (11th Cir. 1999). Those important differences do not, however, affect the extent to which a plaintiff is placed "effectively out of court," which is the measure that defines our appellate jurisdiction over stay orders.

III.

We turn now to the issue of whether the district court had subject matter jurisdiction over this lawsuit based on diversity of citizenship. The plaintiffs argue that Cessna's contention that jurisdiction is lacking is not properly before us because Cessna did not file a

cross-appeal from the district court's conclusion that it did have jurisdiction. It is not too unkind to label this argument frivolous, because "every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541, 106 S. Ct. 1326, 1331 (1986) (quotation marks omitted); accord Defiance Water Co. v. City of Defiance, 191 U.S. 184, 194, 24 S. Ct. 63, 67 (1903) ("The fundamental question of jurisdiction, first, of this court, and then of the court from which the record comes, presents itself on every writ of error or appeal, and must be answered by the court, whether propounded by counsel or not."); Anderson v. Watt, 138 U.S. 694, 701, 11 S. Ct. 449, 450–51 (1891); see also Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

Cessna contends here, as it did in the district court, that the presence of the estate of Jessica King destroys diversity. Where an estate is a party, the citizenship that counts for diversity purposes is that of the decedent, and she is deemed to be a citizen of the state in which she was domiciled at the time of her death. 28 U.S.C. § 1332(c)(2); Palmer v. Hosp. Auth. of Randolph County, 22 F.3d 1559, 1562 n.1 (11th Cir. 1994).

Cessna argues that although she was born in California, Jessica King had severed her ties to her home state and at the time of her death was domiciled abroad, specifically in Denmark. If Cessna is correct that King was domiciled abroad, there is no diversity of citizenship. A United States citizen with no domicile in any state of this country is "stateless" and cannot

satisfy the complete diversity requirement when she, or her estate, files an action against a United States citizen. (Cessna is a Kansas corporation, making it a citizen of at least one state.) See Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 828, 109 S. Ct. 2218, 2221 (1989).

Cessna points to substantial evidence that Jessica King maintained only minimal ties to California after last residing there in 1990, eleven years before her death. It also argues that the district court erroneously placed the burden of proof on Cessna to show a change in King's domicile.

King argues that his daughter's California domicile, which she acquired at birth, was unaffected by her subsequent travels, because she never formed the requisite intent to change that domicile during her foreign residency. Instead, she resided abroad only as part of her mobile career in hotel management. Both parties submitted evidence to the district court concerning whether Jessica King had changed her domicile from California, and the court found that she had not.

The crux of Cessna's attack on the district court's finding is its assertion that the court erred by failing to apply a presumption that Jessica King was domiciled in the country in which she resided at the time of her death. Where, as here, the plaintiff asserts diversity jurisdiction, he has the burden to prove that there is diversity. Slaughter v. Toye Bros. Yellow Cab Co., 359 F.2d 954, 956 (5th Cir. 1996) ("The burden to show the jurisdictional fact of diversity of citizenship

[is] on the . . . plaintiff.").[1] However, once a plaintiff shows a former domicile, "the presumption is that it continues to exist," and the burden shifts to the defendant to present evidence that the domicile changed. Id. at 955 (quoting Stine v. Moore, 213 F.2d 446, 447 (5th Cir. 1954)).

One way for the defendant to satisfy the burden of producing evidence that the domicile changed is by showing that the plaintiff resided elsewhere at the crucial time, which in this case is the time of death. Id. at 956 ("The presumption, upon which the [plaintiff] relies, of the continuance of the domicile of origin is met by the counter-presumption of domicile in the jurisdiction where the party is a resident at the crucial time . . . ."). If the defendant meets this burden, the plaintiff must come forward with evidence showing that the relocation was "for some particular purpose, expected to be only of a temporary nature, or in the exercise of some particular profession, office, or calling." Ennis v. Smith, 55 U.S. (14 How.) 400, 423 (1853). If the plaintiff fails to show that, the place of residence at the crucial time in the litigation becomes the domicile. Id.

According to Cessna, in waltzing through these presumptions the district court tripped over its feet by requiring that Cessna prove King had changed her domicile of birth even after it had proven that King resided abroad at the time of her death. Casting the

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[1] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

issue as a legal one would help Cessna escape the highly deferential clearly erroneous standard that is applicable to fact findings relating to diversity, see Sweet Pea Marine, Ltd. v. APJ Marine, Inc., 411 F.3d 1242, 1248 (11th Cir. 2005), because we review de novo whether the district court applied the correct legal standard. Rolling Greens MHP, L.P. v. Comcast SCH Holdings L.L.C., 374 F.3d 1020, 1021 (11th Cir. 2004).

The district court, however, did not trip up on the law. Instead, the court recognized, in its words, that there is a "presumption which flows from residency at the time of death." It rejected Cessna's position not because the company had failed to meet its burden of production, but because the King plaintiff had presented convincing evidence that King's stay abroad was, again in the court's words, "temporary or transitory in nature due to her work and career goals."

The notion that a citizen of a state does not lose her domicile when her employer sends her abroad is as old as the presumption that a plaintiff's foreign residence is her domicile. In recognizing the presumption on which Cessna relies, the Supreme Court in 1853 carved out an exception for business travel. Ennis, 55 U.S. (14 How.) at 423. The Court wrote:

> But when there is a removal, unless it can be shown or inferred from circumstances that it was for some particular purpose, expected to be only of a temporary nature, or in the exercise of some particular profession, office, or calling, [residence elsewhere] does change the domicil.

Id. The district court, in applying the relevant precedent, did not ignore the presumptive effect of

Jessica King's residence abroad at the time of her death; instead, the court found from the evidence that she was there, in Ennis terms, "in the exercise of some particular profession," that profession being hotel management.

Because the district court committed no legal error in analyzing the facts related to the diversity issue, we are left with the question whether its finding that King traveled pursuant to her career is clearly erroneous. It is not. Cessna did present substantial evidence that Jessica King's ties to California had grown increasingly attenuated, but the estate countered with evidence that she had spent her years abroad slowly building experience with the Marriott corporation. As the district court carefully laid out in its findings, Jessica King's residence in each foreign country where she had lived was in pursuit of her career goals. She continued to visit California regularly while she was residing abroad, and her parents testified that she intended to return there. Although King may have left the "when" of her return open, she had decided the "whether" of it, and in this context whether is what matters. District of Columbia v. Murphy, 314 U.S. 441, 455 n.9, 62 S. Ct. 303, 309 n.9 (1941).

As so often is the case, the evidence gave rise to conflicting inferences, but that is why we have factfinders. Acting in its role as factfinder, the district court resolved the conflicts in favor of the plaintiff and found, as it properly could, that Jessica King retained her original domicile in California. In light of that finding, there is diversity of citizenship subject matter jurisdiction.

IV.

Having concluded that both we and the district court have jurisdiction over this case, we turn to the question of whether the district court abused its discretion in staying further proceedings in the King case. We have repeatedly held that a stay order which is "immoderate" and involves a "protracted and indefinite period" of delay is impermissible. Stone, 743 F.2d at 1523–24; see also Trujillo, 221 F.3d at 1264–65; CTI-Container, 685 F.2d at 1288–90; Hines, 531 F.2d at 733–35.

Trujillo is particularly instructive. In that case we vacated as immoderate a stay pending litigation in the Bahamas because it "seem[ed] indefinite" and it appeared that the stay would expire only after the conclusion of litigation in that foreign forum. Trujillo, 221 F.3d at 1264. This stay, likewise, seems indefinite and apparently will expire only after the conclusion of litigation in Italy. The only way in which this stay materially differs from the one entered in Trujillo is that there the district court expressly found that the litigation already pending in the Bahamas would "directly relate" to those issues raised before the federal court. Id. That distinction, however, only helps King's argument. Here, we have minimal evidence to assess the scope of litigation in Italy and no assurance at all that the Italian proceedings will directly relate to the issues in this lawsuit. Although the district court has asked the parties to submit status reports on the Italian litigation, Trujillo rejected the idea that regular reports can save an otherwise indefinite stay. Id. at 1264 n.3.

Cessna argues that this stay bears a strong similarity to an order certifying questions of state law, a practice this circuit regularly follows. A certified question, however, immediately triggers a state proceeding on the precise question at issue in the federal litigation, and we are assured by past experience that our state court colleagues will act with reasonable dispatch. By contrast, there is no indication when, if ever, the Italian litigation will resolve the claims raised in this case, and whether King will have a meaningful opportunity to participate in those proceedings.

For all of these reasons, we will vacate the stay the district court entered in the King lawsuit and remand that case for further proceedings consistent with this opinion.

V.

The final issue before us is whether the district court abused its discretion in dismissing the actions of the European plaintiffs on forum non conveniens grounds. We will not address that issue on the merits in this appeal, because we think the most prudent course is to vacate that order and remand for further consideration in light of our decision vacating the order staying proceedings in the King case. In balancing the forum non conveniens factors and concluding that it should dismiss the foreign plaintiffs, the district court relied in part on its belief that by staying the King case and nudging the foreign plaintiffs towards litigation in a more appropriate forum it could avoid wasteful and duplicative litigation.

Because we are vacating the stay order and recognizing King's right to proceed in the district court, one of the considerations that led to the district court's ruling in the cases of the European plaintiffs has changed. If the district court had known it could not avoid dual proceedings by staying the King case, it might have dismissed all of the plaintiffs, including King, or allowed all of the plaintiffs to proceed here, or perhaps pursued some other avenue. Rather than speculate as to what, if anything, the court might have done differently had it known that it could not stay proceedings in the King case, we will vacate and remand this entire case to the district court so that it can decide. In doing so, we neither express nor imply any view on the correctness of any options that the district court may choose on remand. Our decision in this appeal is limited to holding that the court had subject matter jurisdiction based on diversity of citizenship, that the stay of the King case cannot stand, and that the district court ought to decide in the first instance how to proceed from here.

We VACATE the order staying the King case and the order dismissing the cases of the foreign plaintiffs, and we REMAND the cases to the district court for further proceedings consistent with this opinion.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 03-20482-CIV-MORENO

[Filed October 21, 2005]

JACK KING, as Personal Representative of the Estate of JESSICA KING, *et al.*,

Plaintiff,

vs.

CESSNA AIRCRAFT CO., a Kansas corporation,,

Defendant.

ORDER ON *FORUM NON CONVENIENS*

I. Background

This case stems from a tragic airplane crash at the Linate airport in Milan, Italy, in 2001. Plaintiffs are numerous personal representatives of the estates of those who died as a result of the crash. Defendant Cessna chartered an aircraft for a demonstration flight for potential aircraft purchasers. As the Cessna

aircraft taxied for take-off in dense fog, it crossed an active runway and collided with a departing commercial aircraft. The collision killed all persons on board both aircrafts. In sum, 118 people died and four ground personnel were injured.

With their first complaint, Plaintiffs alleged that the crash was caused by Defendant's failure to properly implement policies and procedures in relation to the demonstration flight. Plaintiffs' claims have since been modified and Plaintiffs now allege that Defendant is strictly liable for conducting the ultra-hazardous activity of flying an aircraft in dense fog, and that Defendant is directly liable for the negligent hiring and supervision of the chartered flight crew.

Shortly after Plaintiffs filed their first complaint, Defendant moved this Court to dismiss the case for *forum non conveniens*. This Court denied the motion, though it was a close case. The Court deferred to the choice of forum of Jack King, the plaintiff in the first filed case, because he is a United States citizen. Prior to that decision, the Court, for the sake of economy and efficiency consolidated Jack King's case with those of the 69 other Plaintiffs, all European citizens. Following the denial of its motion to dismiss, Defendant moved for Reconsideration, and the Court again denied Defendant's motion without an opinion and with leave to refile after the King trial.

Since the prior denied motions, the case has changed. Both parties have modified their claims. Issues of Italian law which were deemed simple in the past, have become complicated. The Court, *sua sponte*, asked parties to re-brief the Reconsideration of the

Motion to Dismiss based on *forum non conveniens,* and oral arguments were heard on October 7, 2005.

II. Standard of law - *Forum Non Conveniens*

At its discretion, a court may dismiss a case for *forum non conveniens* "when trial in the chosen forum would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience, or when the chosen forum [is] inappropriate because of consideration affecting the court's own administrative and legal problems." *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 249 (1981). Furthermore, "dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court and where the plaintiff is unable to aver any specific reasons of convenience supporting its choice." *Id.*

In a motion to dismiss for *forum non conveniens,* the movant must show that "(1) an adequate alternative forum is available, (2) the public and private factors weigh in favor of dismissal, and (3) the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice." *Leon v. Million Air, Inc.,* 251 F.3d 1305, 1311 (11th Cir. 2001). The above factors are balanced with the court looking at the advantages and the disadvantages of each forum and with no one factor controlling. *See Warter v. Boston Securities, S.A.*, 380 F. Supp. 2d 1299, 1306 (S.D. Fla. 2004). When analyzing the private and public factors, however, the private factors are considered first. *See SME Racks, Inc. v. Sistemas Mecanicos Para Electronica,* S.A., 382 F.3d 1097, 1100 (11th Cir. 2004). If the private factors are found to be

"equipoise or near equipoise" then the Court will turn to the public factors to tip the balance. *Id.*

III. Analysis

A. Deference to Plaintiffs' Choices of Forum

In *a forum non conveniens* inquiry, courts show deference to a plaintiff's choice of forum. *See SME Racks, Inc.*, 382 F.3d at 1101 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). This presumption for the plaintiff's choice is strongest when the plaintiff is a United States citizen, resident, or corporation. *Id.* In fact, a material injustice must manifest before a court can deny a United States citizen access to a United States court. *Id.* A foreign plaintiff's choice of forum, however, is a weaker presumption and receives far less deference. *See Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001); *see also In re Air Crash over the Taiwan Strait on May 25, 2002*, 331 F. Supp. 2d 1176, 1190 (C.D. Cal. 2004) (holding that "because foreign plaintiffs typically have fewer contacts with the forum," it is likely "that they have chosen it for some reason other than convenience").

In this case, the members of the King family are the only plaintiffs who are United States citizens. All other plaintiffs are from European countries. Therefore, in the following *forum non conveniens* analysis, the King Plaintiffs' choice of forum will receive a high level of deference and a presumption of convenience. All other foreign plaintiffs' choices, however, will receive less deference because it is likely that their choice was made "for some reason other than convenience."

B. An Adequate Forum

The first question the Court must answer is whether the alternative forum, an Italian court in this case, is available and adequate. At the time of the Court's initial order regarding *forum non conveniens,* the parties agreed that Italy provided an available and adequate forum. Now, however, Plaintiffs dispute the adequacy of an Italian forum under Defendant's version of Italian law.

"An adequate forum need not be a perfect forum;" however, the forum must afford a satisfactory remedy. *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283 (11th Cir. 2001); *see also Warter*, 380 F. Supp. 2d at 1307 (holding that an alternative forum is inadequate if the remedy it affords is "clearly unsatisfactory" or is "essentially no remedy at all"). A forum is adequate even though it provides a remedy that would be substantially less than the remedy in the United States. *See Sigalas v. Lido Maritime, Inc.*, 776 F.2d 1512, 1519 (11th Cir. 1985); *see also Pain v. United Technologies Corp.*, 637 F.2d 775, 794 (D.C. 1980) (holding that "the comparative amount of recovery obtainable in two alternative forums has never been considered a factor relevant to the *forum non conveniens* inquiry").

Furthermore, an adequate forum is usually found when "the defendant is amenable to process" in that other forum." *Satz*, 244 F.3d at 1283. Differences in law and procedure do not make the forum inadequate. For example, the ability of a plaintiff to hire an attorney on a contingency basis in the alternative forum is not considered. *See Margin v. Teledyne Continental Motors*, 91 F.3d 1424, 1430 (11th Cir.

1996) (holding that if the availability of a contingency fee arrangement was given substantial weight, "then a case could almost never be dismissed because contingency fees are not allowed in most forums"). Also not considered is the fear of delay in foreign courts. *See Satz*, 244 F.3d at 1283.

In this case, Defendant is willing to submit to jurisdiction in Italy and is amenable to process in Italy. Therefore, Italy provides an adequate forum. Plaintiffs argue that Defendant's claim that Italian law provides no relief to Plaintiffs precludes Defendant from arguing that Italy is an adequate forum. Defendant's claim, however, has yet to be decided and, at any rate, can be decided best by an Italian court. Italy is an adequate forum. Italian courts have many times addressed tort liability and damages in airplane crash cases and many times produced satisfactory remedies.

C. Private and Public Interest Factors

The Supreme Court has outlined a number of factors for courts to consider in *a forum non conveniens* determination. These factors, however, are not exhaustive or dispositive and the Court is free to be flexible in responding to cases as they are presented. *See Sigalas*, 776 F.2d at 1519. The private interest factors include (1) ease of access to sources of proof and evidence, (2) availability and costs of obtaining willing and unwilling witnesses, and (3) "all other practical problems that make the trial of the case easy, expeditious and inexpensive." *Gilbert*, 330 U.S. at 508. If the private interest factors are at equipoise, the Court will also consider the following public interest factors: "(1) the sovereigns' interests in deciding the

dispute, (2) the administrative burdens posed by trial, and (3) the need to apply foreign law." *Warter*, 380 F. Supp. 2d at 1314 (quoting *Satz*, 244 F.3d at 1284).

1. Private Factors

The analysis of private factors begins with the ease of access to evidence and availability of witnesses. The Court will first identify the elements of a plaintiff's causes of action and then determine the location of the evidence necessary to prove and disprove each element. The location of much of the evidence in this case is Italy. Although the Court's initial order emphasized the importance of the evidence already gathered , the depositions already taken, and the crash reports already translated, the Court failed to mention Defendant's need to gather evidence on the tort element of causation. Defendant disputes causation based on intervening factors, the evidence of which c an only come from Italian witnesses, such as individuals working with air traffic control at the Linate airport.

Additionally and more importantly, at the time of the Court's initial order, the Court assumed that only one trial on liability for all Plaintiffs would be necessary. However, it is apparent that the liability issues differ among Plaintiffs because not all Plaintiffs have signed the same release form in settling with the other potentially liable parties in Italy. The damages will also differ because under Italian law, each Plaintiff is entitled to only the support which she was actually receiving from the decedent. As the case now stands, the lack of commonalities among the Plaintiffs and the additional effort that would have to be exerted by the Court to deal with each Plaintiff individually

fall under the "practical problems" factor listed in *Gilbert*. The process will no longer be expeditious and inexpensive. For example, with regard to the foreign plaintiffs, most of the discovery has yet to begin and all evidence necessary to determine liability and damages is located in Europe. The Court does note, however, that with regard to the King Plaintiffs, much if not all of the evidence has already been gathered. Additionally, the King evidence on damages is likely located in the United States.

A further "practical problem" exists in that some plaintiffs have already litigated and continue to litigate a similar suit in Italy concerning the Linate crash. In its initial order, the Court held that it would retain jurisdiction of all cases in order to avoid parallel litigation in other courts. However, this reason has been undermined by fact that suits are ongoing on these issues in the Court of Milan. Additionally, because Defendant Cessna is willing to submit to jurisdiction in Italy, the Court of Milan is the only forum where Plaintiffs will be able to resolve all of their claims in a single proceeding, which would be the most expeditious and inexpensive way to resolve the case.

2. Public Factors

The public factors mentioned by the Supreme Court include each forum's interest in hearing the case, the administrative burdens placed on this Court in hearing the case, and the need to apply foreign law. In the Court's initial order denying the motion to dismiss, the Court recognized that both the United States and Italy have strong interests in deterring negligent conduct. The Court reasoned that the United States

had a greater interest in hearing the case because Italy had already settled its claims and filed criminal charges in regard to the Linate crash. Now, however, the Court has been told that claims are ongoing in Italy. Thus, Italy retains its interest in resolving this case, especially since the tragic event occurred on Italian land. The Court's order also noted that this case may be resolved more quickly in the United States. This conclusion is no longer certain. Here, the Court will potentially have to try all 70 Plaintiffs individually on both the liability and damages issues.[1] This prospect places a heavy burden on the Court's limited resources and uses United States tax dollars and juries to try a case that resolves the disputes of European Plaintiffs in a United States forum.

In addition to these concerns, the public interest factors include "the need to apply foreign law." *Membreño v. Costa Crociere S.P.A.*, No. 04-16732, slip op. at 3688 (11th Cir. July 27, 2005). The Eleventh Circuit has repeatedly held that "the need to resolve and apply foreign law should 'point the trial court towards dismissal.'" *Sigalas*, 776 F.2d at 1519 (quoting *Piper*, 454 U.S. at 260); *see also Proyectos Orchimex de Costa Rica, S.A. v. E.I. Dupont de Nemours & Co.*, 896 F. Supp. 1197, 1204 (M.D. Fla.) ("even the possibility that foreign law applies to a dispute is sufficient to warrant dismissal on *forum non conveniens* grounds").

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[1] Plaintiffs' counsel suggests that in airplane crash cases, only a few "representative" Plaintiffs proceed to trial. Furthermore, the releases signed by the Plaintiffs could be grouped. Thus, it is highly unlikely that the Court would actually try 70 cases on the same accident. The Court acknowledges counsel's experience in these types of cases, but must still make a ruling that is devoid of speculations.

Dismissal is warranted so that events occurring on foreign land are adjudicated by foreign courts, especially where the foreign court has already adjudicated similar issues. *See Ford,* 319 F.3d at 1310; *see also Piper,* 454 U.S. at 260 (holding that there is "a local interest in having localized controversies decided at home"). Furthermore, the Supreme Court has held that courts are better off applying the laws with which they are familiar. *See Piper,* 454 U.S. at 260; *see also Magnin v. Teledyne Continental Motors,* 91 F.3d 1424, 1430 (11th Cir. 1996) (holding that since French substantive law applied, it would be "far better that the case be tried in France by one or more jurists" who are familiar with French law). In *Ford,* the Eleventh Circuit explained, "[T]ort law is rife with nuances that are not consistently found throughout all jurisdictions. Therefore, the foreign country is ordinarily the best place to litigate a dispute revolving around a foreign rule of decision." *Ford v. Brown,* 319 F.3d 1302, 1310, n. 24 (11th Cir. 2003).

The nuances of foreign tort law are especially obvious in this case as the Court and the parties witnessed at the two-day Italian law hearing. In the Court's initial order denying the motion to dismiss, the Court held that the parties agreed that the Italian "legal issues [were] fairly simple." However, this is no longer the case. At the Italian law hearing, the parties' Italian law experts interpreted the same Italian codes and cases in opposing ways. Additionally, now the Court must potentially decide nine different issues of Italian law. The numerous Italian law issues that will need to be decided, and the Italian interest in ongoing litigation with some Plaintiffs "point the trial court towards dismissal."

If this case is dismissed, Plaintiffs will still have the opportunity to litigate in Italy. At oral argument Plaintiffs' counsel made an impassioned plea to consider the plight of the "widows and orphans" who have been waiting for justice from the airplane crash four years ago. The court is extremely sympathetic to anyone who has lost a loved one, even those who are not "widows and orphans," such as the first filed plaintiff Jack King, the father of the decedent, Jessica King. Nevertheless, courts in Italy also dispense justice and, in fact, have done so in this case already. We in the United States may differ with our friends in Europe on the amount of compensation due to victims of accidents, just as we apparently disagree on other important issues such as welfare, the degree of government intrusion in private businesses, the death penalty, *et cetera*. But just because we believe that our judicial system is better for us does not automatically open our courts to resolve these suits brought by 69 European plaintiffs claiming negligence resulting from an airplane crash occurring in Italy. The Court, in exercising its discretion, has balanced the various public and private interests already discussed. Therefore it is ordered that the claims of all European plaintiffs be dismissed so that they may pursue just compensation before Italy's courts where the litigation regarding this accident has been ongoing for years.

Plaintiffs' counsel are understandably disturbed that they have relied on this Court's initial denial of Defendant's motion to dismiss. It is true that the Court should have granted such motion earlier. Yet, a court's decision not to correct an error just compounds that error. Requirements that counsel seek redress at the trial level before arguing error on appeal exist to give a trial judge the opportunity to correct mistakes made

by the Court. This Court avails itself of such opportunity, albeit later than it should have. A judge is bound to follow the law irrespective of any emotional pleas once that judge has recognized the law despite his own prior rulings to the contrary.[2]

As this case now stands, it is clear that the Court of Milan in Italy would be a more convenient forum for the Plaintiffs and the Defendants. Further, the Court recognizes the deference given to United States Plaintiffs and their choice of a United States forum. Foreign plaintiffs, however, receive no such deference. Therefore, the Court deconsolidates the United States Plaintiffs (the King family) from the 69 other European Plaintiffs. The Court dismisses this case as to the European Plaintiffs for *forum non convenienes*. The King case, however, will remain in the United States because King is an American plaintiff who has selected a Florida forum and is thus entitled to a presumption of his choice of forum.

Additionally, the King Plaintiffs' case is stayed pending resolution of this case in Italian courts. The Court is bound to apply Italian law. The reluctance of the Court in applying Italian law is not due to its difficulty, but as to the apparent direct conflict in the experts' testimony. Because the King case will be stayed until the Italian courts have resolved the Italian law disputes as they relate to the 69 other plaintiffs, this Court will have the benefit of actual Italian court decisions that are related to this precise case, and there will not be any conflict in following

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[2] After all, "a foolish consistency is the hobgoblin of small minds." (Ralph Waldo Emerson).

Italian law. In fact, the King family has apparently litigated a civil suit against other European defendants in the Court of Milan seeking recovery for the same injuries that are the subject of this litigation. At oral argument, counsel for the Plaintiffs were unable to provide any details of the civil action alleged to have been prosecuted by Jack King as claimed by Defendant in footnote one, page 5, of the Memorandum in Support of Further Reconsideration of Cessna's Motion to Dismiss for *Forum Non Conveniens*. Therefore, the American Plaintiff who chose to proceed in an Italian court already, is not prejudiced if his case in an American court proceeds after the Italian court decides the same Plaintiff's suit over the same accident, albeit against other defendants. Staying the King trial will reduce the costs to both Plaintiffs and Defendant in litigating the issues of Italian law prior to disposition of any of the King family members suit against Cessna.

IV. Conclusion

Based on the foregoing, Defendant's Motion for Reconsideration of the Order Denying Motion to Dismiss is GRANTED IN PART as to the 69 European Plaintiffs, and DENIED IN PART as to the American Plaintiffs, the King family. Furthermore, the King case will be stayed until the Italian courts have resolved the Italian law disputes as they relate to the other 69 Plaintiffs. This case will thus be removed from the trial calendar and placed in the civil suspense file. The parties must report in writing every twelve months on the progress of the litigation in Italy in order to reactivate this case after the issues of Italian law have been decided by Italian courts.

DONE AND ORDERED in Chambers at Miami, Florida, this 20th day of October, 2005.

/s/
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 03-20482-CIV-MORENO

[Filed October 29, 2004]

JACK KING, as Personal Representative of the Estate of JESSICA KING, *et al.*,

Plaintiff,

vs.

CESSNA AIRCRAFT CO., a Kansas corporation,

Defendant.

ORDER DENYING MOTION TO DISMISS

An American Plaintiff, along with many foreign Plaintiffs, have sued an American Defendant in an American Court as a result of an aircraft accident which occurred in Italy. The Defendant moves to dismiss the complaint alleging that Italy is a more convenient forum. After weighing the various private and public interest factors and giving the required level of deference to the Plaintiffs' choice of forum, the Court finds that the Defendant has failed to show that

a material injustice would be manifest if the case were tried in the United States. Therefore, the Motion to Dismiss on *forum non-conveniens* grounds is DENIED.

BACKGROUND

This case arises out of a terrible tragedy which occurred on a foggy runway in Milan, Italy in the early morning hours of October 8, 2001. Plaintiffs are numerous personal representatives of the estates of those who died as a result of the accident. The Defendant is a Delaware corporation which manufacturers and sells aircrafts. Although it conducts business nationally and worldwide, its headquarters is in the State of Kansas. It is registered to do business in Florida and regularly conducts business in Florida. Most of its business is conducted in the United States.

On October 8, 2001, the Defendant Cessna chartered a Cessna aircraft from a former client, Air Evex, to whom it had recently sold the aircraft. Defendant Cessna chartered the aircraft so that it could more conveniently show a prospective purchaser the benefits of owning a Cessna aircraft. These flights are known as demonstration flights. The aircraft flew from Germany to Milan, Italy to pick up a Cessna sales associate and the prospective buyer. As the small Cessna aircraft taxied for take-off, it crossed an active runway. As it did so, it collided with a large commercial aircraft departing the Milan airport. The collision killed all persons on board both aircrafts. In total, 118 people were killed and 4 ground personnel were injured. The Plaintiffs filed suit in the United States District Court for the Southern District of Florida alleging claims of wrongful death and

negligence on the part of Cessna. Plaintiffs allege that the crash was caused by the Defendant's failure to properly implement policies and procedures in relation to demonstration flights. Defendant Cessna has moved this Court to dismiss this case on the grounds of *forum non-conveniens*.

STANDARD

The burden is on the movant to show that it is entitled to the relief sought. Defendant seeks to have the case dismissed under the doctrine of *forum non-conveniens* and to have the case decided by an Italian judge. This is a diversity case and federal *forum non-conveniens* law governs diversity cases. *Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300 (11th Cir. 2002). In deciding whether to dismiss a case on *forum non-conveniens* grounds, courts are to examine (1) the availability of an alternative and adequate forum; (2) the appropriate deference to be given to the Plaintiffs' choice of forum; (3) the private interest factors, and (4) the public interest factors. *Piper Aircraft Co. V. Reyno*, 454 U.S. 235, 257 (1981). In the end, the Defendant must present "positive evidence of unusually extreme circumstances" and "thoroughly convince [this Court] that material injustice is manifest before ousting a domestic plaintiff from this Country's courts". *SME Racks Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1101-1102 (11th Cir. 2004) (citing *La Seguridad v. Transytur Line*, 707 F.2d 1304, 1308 n.7 (11th Cir. 1983) (emphasis added). The Defendant agreed at oral argument that this is a high standard, albeit not an insurmountable one.

SUMMARY OF FACTORS

I. Available and Adequate Forum

The parties agree that Defendant Cessna is amenable to process in Italy and they agree that Italy is an available forum. Defendant has presented uncontested evidence that the law and remedies are substantially the same between the two fora. Thus, the Court finds that Italy is an adequate and available alternative forum.

II. Deference

A. Domestic Plaintiff

A "plaintiffs' choice of forum should rarely be disturbed 'unless the balance is strongly in favor of the defendant." *SME Racks*, 382 F.3d at 1101 (quoting *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501 (1947)). The Eleventh Circuit has repeatedly held that a domestic plaintiff's choice of forum is entitled to a strong presumption that the forum is convenient and the Court is to give a high level of deference to that choice. *Leon v. Miller Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001). Plaintiff Jack King, as representative of the estate of Jessica King, is a citizen of the United States and thus deserving of the full deference normally given to a domestic Plaintiff.

B. Foreign Plaintiffs

Although Jack King is a United States citizen, the remaining Plaintiffs are European. Plaintiffs argue that various treaties require the Court to apply the same level of deference given to a domestic plaintiff.

Defendant argues that the Court is to afford the foreign Plaintiffs much less deference due to the fact that they are not citizens of the United States.

The Effect of Treaties

At the hearing, the Plaintiffs' counsel argued at length that various Friendship, Navigation, and Commerce treaties should have an equalizing effect on the Court's deference standard. He argued that the "most favored nation" or the "no less favorable treatment" language found in the treaties means that a foreign plaintiff is entitled to the same deference as a domestic plaintiff. At oral argument Plaintiffs' counsel, rather than answering the Court's questions, proceeded to repeat what he had written in his four page written response. The Court was not persuaded by the written response, much less by the evasive oral presentation.

Counsel relies heavily on Second Circuit opinions, which do not directly analyze why a treaty should affect the level of deference to be applied during the *forum non-conveniens* doctrine analysis.[1] See *Farmanfarmaian v. Gulf Oil Co.*, 588 F.2d 880 (2nd Cir. 1978); . *Alcoa Steamship Co., Inc., v. M/V Nordic Regent*, 654 F.2d 147 (2nd Cir. 1980) (*en banc*); *Irish National Insurance Co. Ltd., v. AER Lingus Teoranta*, 739 F.2d 90 (2nd Cir. 1984); *Blanco v. Banco Industrial de Venezuela, S.A.*, 997 F.2d 974 (2nd Cir.

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[1] *See* Allen Jay Stevenson, Comment, *Forum Non-Conveniens and Equal Access Under Friendship, Commerce, and Navigation Treaties: A Foreign Plaintiff's Rights*, 13 HASTINGS INT'L & COMP. L. REV. 267 (citing a history of the opinions but not providing an analysis of the impact on the *forum non-conveniens* doctrine).

1993); *Iragorri v. United Technologies Corp.*, 274 F.3d 65 (2nd Cir. 2001) and *Pollux Holding Ltd., v. Chase Manhatten Bank,* 329 F.3d 64, 72-73 (2nd Cir. 2003). All of these opinions refer to the earlier Second Circuit's opinion in *Farmanfarmaian* and, although the court in that case mentioned the treaty with Iran, the court also stated that the issue was not outcome determinative, and thus it is *dicta*. *Farmanfarmaian*, 588 F.2d at 882. This Court is not bound to follow Second Circuit *dicta* and nothing suggested by Plaintiff's counsel at oral argument has assisted the Court in reaching the conclusion sought by the Plaintiffs on this issue.

The Second Circuit opinions demonstrate that using the language of a treaty to determine the level of deference which should be afforded to a foreign plaintiff's choice of forum would be unworkable. Were this Court to adopt counsel's position, courts would be routinely forced to interpret the language of many different treaties. See *Murray v. British Broadcasting Corp.*, 81 F.3d 287 (2nd Cir. 1996) and *Pollux*, 329 F.3d at 72-73 (2nd Cir. 2003). The Second Circuit has even gone as far as examining the legislative history of such treaties. *Id* at 291. Such legislative history and intent of treaties are far removed from the analysis required in order to decide the motion to dismiss on *forum non-conveniens* grounds.

The Eleventh Circuit, sitting *en banc*, has compared "the court's inherent power to protect the integrity of its process through *forum non-conveniens*" to a "court's inherent power to punish contempt." *See Sibaja v. Dow Chemical, Co.*, 757 F.2d 1215, 1218 (11th Cir. 1985). Allowing a treaty, including its legislative history, to have such an arbitrary impact on

the courts' inherent powers is another reason not to adopt counsel's position.

The history and principles underlying the doctrine of *forum non-conveniens* also support this Court's decision not to adopt counsel's position regarding treaties. The *forum non-conveniens* doctrine, although originating in Scotland, became part of the common law of many states and federal admiralty law. *Piper*, 454 U.S. at 248 n.13. The doctrine is based on principles of fairness and justice; the same principles incorporated into the due process clause. The law is clear that a treaty stands on the same footing as law created by Congress. But a treaty does not stand on the same footing as Constitutional principles.

Plaintiffs' counsel argues that an "access to courts' clause found in an treaty modifies the law on *forum non-conveniens*. This Court, however, joins the courts which have held that treaties have no effect on the *forum non-conveniens* analysis. *See Morales v. Ford Motor Co.*, 313 F.Supp.2d 672 (S.D. Tex. 2004); *Dominguez-Cota v. Cooper Tire & Rubber Co.*, 284 F.Supp.2d 444, 450 (N.D. Miss. 2003) and *Zermeno v. McDonnell Douglas Corp.*, 246 F.Supp2d 646, 661-62 (S.D. Tex. 2003).

Furthermore, there are some Plaintiffs from Sweden. The Plaintiffs have been unable to locate any treaty between Sweden and the United States. Adopting Plaintiffs' argument would result in three different classes of Plaintiffs. This provides an additional reason to reject Plaintiffs' position. Plaintiffs' counsel asks the Court to apply the same analysis to the Swedish Plaintiffs because these "these types of treaties are difficult to track down..."

Difficulties in locating these documents is not a basis to institute a rule of law.

Level of Deference

The Eleventh Circuit has held that a foreign plaintiff's choice of forum is deserving of less deference. *Leon*, 251 F.3d 1311. Defendant argues that this equates to little deference. However, the Eleventh Circuit has also ruled that "nationality of the parties is relevant only insofar as it relates to convenience and fairness of the forum." *La Seguridad*, 707 F.2d at 1308. Here, nationality is just one factor to be examined in determining the level of deference to be given to a plaintiff's choice of forum.

When a domestic plaintiff is joined with a foreign plaintiff, as here, the Court has basically three options. First, it can adopt Defendant's suggestion, effectively ignoring the deference to be given to the domestic plaintiff's choice of forum, and then dismiss the entire case. Second, it can apply a strong presumption to the domestic plaintiff's case but not to the foreign plaintiffs' case and then dismiss the foreign plaintiffs' cases while retaining the domestic plaintiff's case. This second alternative would result in the two cases proceeding in different jurisdictions, all in the name of convenience itself! The third option is to allow foreign plaintiffs to bring these claims in the United States based on the fact that there is also a United States Plaintiff and a United States Defendant. This third alternative is the more reasonable approach.

III. Private Interest Factors

As a court examines the private interest factors it must keep in mind that no single factor is controlling and should look at "all other practical problems that make trial of a case easy, expeditious and inexpensive." *Satz*, 244 F.3d at 1283 (quoting *Republic of Panama*, 119 F.3d at 952 (quoting *Gulf Oil v. Gilbert*, 330 U.S. 501, 508)). The private factors are generally considered more important than the public factors, but both should be considered in every case. *See Leon*, 251 F.3d at 1311 (citing *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283-84 (11th Cir. 2001). If the private factors are "at or near equipoise" the Court is to look to see if the public factors tip the scales in the Defendant's favor. *SME Racks*, 382 F.3d 1097. The Court must give a high level of deference to the Plaintiff's choice of forum and the Defendant carries the heavy burden of showing that a material injustice is manifest.

Defendant relies heavily on *Satz* to support its motion to dismiss. *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279. Defense counsel argued well at the hearing that in *Satz* both the defendant and the plaintiff were citizens of the United States.[2] Nevertheless, nationality is not dispositive of the level of deference issue as the undersigned judge well knows since he was recently reversed in *SME Racks*. *SME Racks*, 382 F.3d 1097. The rest of the *Satz* opinion dealt on whether an alternative forum was available and adequate, an issue not in dispute here.

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[2] The Eleventh Circuit found that the location of the evidence to be a controlling factor in that case.

SME Racks is most helpful to the *forum non-conveniens* analysis. In reversing this Court's adoption of the magistrate's report and recommendation, the Eleventh Circuit held that a court must apply the presumption during its analysis of the private interest factors and must take into account the public interest when those factors are "at or near equipoise." *See SME Racks*, 382 F.3d at 1102. A court must also specifically weigh the relative advantages and disadvantages of each forum as it examines the private interest factors and consider them consistently with the presumption in favor of plaintiff's choice of forum. *SME Racks*, 382 F.3d at 1103. These decisions demonstrate that the analysis is fact intensive and no one factor is controlling, including whether the party is a citizen of the United States.

Private Interest Factors Favoring Retention

1. Evidence Gathered to Date

There are two reports on the incident which deal with the causes of the crash, one created by the Italian government and one created by Defendant Cessna. These have already been translated into English. Numerous depositions have already been conducted by the parties. Although not focused on the damages aspect, the depositions have touched upon liability because they are inextricably intertwined with the forum *non-conveniens* issues. The Court must also consider the considerable amount of time and money expended by the parties in taking these depositions, which, according to counsel's representations at oral argument, will not be helpful in Italy because discovery is apparently not allowed in that country.

2. The Omission of Acts in the United States

The Defendant argues that the case has no contacts with the United States because the collision occurred in Italy. Yet, the Plaintiffs' theory of liability is based on a failure to implement "demonstration flight" policies from the Defendant's headquarters in the United States. Plaintiffs claim that there was a breach, continuous in nature, which eventually resulted in an accident in Italy. It is much like a design defect in the package of services which are provided by Cessna. Most of this evidence will be in the English language, which would need to be translated if the case were to be tried in Italy. This would mean additional costs if the case were dismissed in the United States and to be tried in Italy.

Defendant continually refers to the fact that the wreckage is located in Italy but does not state the relevance of such factor. As mentioned above, reports exist that have already been prepared in which the investigators have explained the tragedy in painstaking detail. No evidence has been presented indicating that an Italian judge will visit the crash site or examine the four year old wreckage. The real issue is whether resolution of Plaintiffs' claims involves gathering evidence in Italy. It does not.

3. Cost of Obtaining Attendance of Willing Witnesses

There are only two witnesses living abroad who are likely to be witnesses and who were involved in the chartering of the flight and they are agents of the Defendant. The rest of the witnesses, who are also Defendant's employees live and work in the United States. These employees allegedly are in charge of

creating and implementing policies related to flight safety. Trying the case in Italy is no more convenient, even if Defendant is ready to bare those costs.

4. Defendant's Home Forum

As the Eleventh Circuit has made clear, courts are not limited to the typical factors but instead should look at any factors which reasonably bare on the fairness of having the case heard in either forum. Just as a foreign plaintiff's choice might be considered less reasonable or inconvenient, the same holds true for a domestic Defendant. Although the Defendant is not entitled to any presumption, it is reasonable to consider the Defendant's nationality during the forum analysis. The Court has considered it, although it has not given it great weight.

Private Interest Factors Favoring Dismissal

Contribution by Other Defendants

Defendant continues to focus on the possibility of other likely defendants to share in any liability verdict and to contribute financially to any possible damage amount. Defendant's argument relating to potential liability of these other defendants boils down to the effect of certain releases. The Court can rule on the impact of those releases without including other defendants, over which it has no jurisdiction. In any event, the Defendant has not made any significant showing that third party defendants are necessary.

Therefore, these private interest factors also weigh in favor of Plaintiffs' choice of forum.

IV. Public Interest Factors

The Court must consider public interest factors as well, especially if the private interest factors are "at or near equipoise."

Public Interest Factors Favoring Retention

1. Court Congestion

Defendant and Plaintiffs' experts agree that resolution of the case in Italy will take between three to five years. The transfer of this case to Italy will apparently burden an already overtaxed system, resulting in undue delay. At the present time, this Court's docket will allow for sooner disposition of the case because much of the discovery has been completed.

2. Federal Interest

The Eleventh Circuit has held that there are factors supporting a finding that there is a strong federal interest. *See SME Racks*, 382 F.3d 1104. There is a strong federal interest in ensuring that a domestic plaintiff have a place to bring suit. *Id.* "Relevant public interest factor includes the sovereigns' interest in deciding the dispute." *Republic of Panama, v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 953 (11th Cir. 1997). There is a strong federal interest in deterring negligent conduct by an American company operating nationally.

Defendant is a United States company and ninety percent of its business is conducted in the United States. Although this is not a products liability case,

the Defendant manufactures the aircraft in the United States and its parent company, Boeing, is located in the United States. Plaintiff King is a citizen of the United States.

Florida also has an interest in this case. The Defendant does much business here and is licensed in this state. Although the crash did occur in Italy, the Italian government has already settled its claims and has even charged numerous persons criminally. Defendant admits that it does very little business in Italy. In fact, it concedes that such flights are "anomalies."

Therefore, the Court finds strong federal and state interests in trying the case in the United States.

Public Interest Factors Favoring Dismissal

Application of Foreign Law

The parties agree that Italian law controls the case but that the legal issues are fairly simple. There are a few legal issues related to the effect of certain releases found in other settlement agreements entered into by the Plaintiffs. The Plaintiffs argue that the releases entered into by the other European actors act as a bar to any contribution sought by the Defendant. The Defendant believes that these other releases also act to release Defendant Cessna from liability. Courts are charged with contract interpretation and this Court has been obligated to interpret foreign law in the past in other cases, and with counsel's assistance will assume such obligations again. The foreign law factor alone is simply not enough to overcome the level of

deference given to Plaintiffs' choice of forum. *See SME Racks*, 382 F.3d at 1104.

Finally, the Defendant argues that it is not liable. If true, a sooner disposition, for example, at the summary judgment stage, would benefit the Defendant. That apparently is more likely to occur sooner here than in Italy.

CONCLUSION

The Defendant has failed to show that a material injustice would be manifest if the case were tried in the Untied States. The Court must defer to the Plaintiffs' choice forum.

WHEREFORE the Defendant's Motion to Dismiss on *Forum Non-Conveniens* Grounds **(D.E. No. 39)** is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 29th day of October, 2004.

/s/
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08-11033-CC

[Filed May 22, 2009]

JACK KING, as personal representative of the Estate of Jessica King, deceased,
Plaintiff
Cross-Appellee,

BARBARA BREGA,
ANETTE FORSMAN, individually and/or as personal representative and/or as the Person legally authorized under applicable law to bring this wrongful death case for herself, all potential beneficiaries and/or The Estate of Robin Forsman, deceased, et al.,
Plaintiffs-Appellants,

versus

CESSNA AIRCRAFT CO.,
a Kansas corporation,
Defendant-Appellee
Cross-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: DUBINA, BLACK and FAY, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE